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A BLUEPRINT FOR PUBLICLY FUNDED LEGAL SERVICES

Volume 1

1997





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Volume 1

1997



The Ontario Legal Aid Review was established by the Ontario Government in December 1996 as an independent task force, with a mandate to undertake a comprehensive review of legal aid in Ontario. The Review was asked to consider all legal aid programs in the province with the objective of identifying aspects that should be reduced, maintained or enhanced in order that the current and future legal needs of low-income residents of Ontario can be met in the most effective and efficient way possible.

Panel Members

John D. McCamus, MA, LLB, LLM, *Chair*

Susan J. Brenner, LLB

The Hon. Madam Justice Joan L. Lax, LLB

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Ontario Legal Aid Review

The Honourable Charles Harnick
Attorney General for Ontario

Dear Attorney:

We have the honour to submit the *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services.*

A handwritten signature in black ink, appearing to read 'John D. McCamus'.

John D. McCamus
Chair

A handwritten signature in black ink, appearing to read 'Susan J. Brenner'.

Susan J. Brenner

A handwritten signature in black ink, appearing to read 'Madam Justice Joan L. Lax'.

Madam Justice Joan L. Lax

A handwritten signature in black ink, appearing to read 'Sherry Phillips'.

Sherry Phillips

A handwritten signature in black ink, appearing to read 'Judge Joseph B. Wilson'.

Judge Joseph B. Wilson

A handwritten signature in black ink, appearing to read 'David I. Richardson'.

David I. Richardson

A handwritten signature in black ink, appearing to read 'Geoffrey Zimmerman'.

Geoffrey Zimmerman

August 1997

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3. Legal Aid, Aboriginal People, and the Legal Problems Faced by Persons of Aboriginal Descent in Northern Ontario
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David Crerar

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ACKNOWLEDGEMENTS

The completion of this comprehensive review of the legal aid system in Ontario could not have been achieved without the cooperation of literally hundreds of individuals across the province of Ontario. In chapter 1, we describe our consultation process which included a solicitation of briefs and a series of public hearings conducted in various centres across the province. The Review is very much indebted to all of those who made written submissions, participated in the hearings, and especially those, including local clinic staff and Area Directors of the Ontario Legal Aid Plan, who assisted the Review in organizing these hearings.

The Review was most fortunate in being able to appoint Professor Michael J. Trebilcock of the Faculty of Law of the University of Toronto as our Research Director. Professor Trebilcock, in turn, assembled an excellent team of scholars and researchers who produced a remarkable body of research on various aspects of legal aid. Those papers, from which we have drawn quite freely in drafting our report, are reproduced in Volumes II and III. In our view, they constitute a major contribution to the analysis of legal aid issues. We are very grateful to Professor Trebilcock, and the members of the team which he assembled, for this contribution to our work.

Our researchers, in turn, were greatly assisted by a variety of groups and individuals. A number of the research studies were, in effect, case studies on particular substantive areas of the law. For each of these studies, we assembled Advisory Teams, the members of which are listed in Appendix C to this report. Copies of briefs relevant to particular projects were forwarded to the researcher in question. The senior management and staff of the Plan were very cooperative and helpful in responding to what may have seemed like an endless series of requests for information concerning the operations of the Plan from our researchers and from the Review staff.

We wish to acknowledge explicitly the generous support of the Review afforded by the Provincial Director of the Plan, Robert L. Holden; the Deputy Director, Legal, George A. Biggar; the Deputy Director, Appeals, Ruth Lawson; the Deputy Director, Finance, David Porter; and the Manager of Clinic Funding, Joana Kuras. Our relationship with the Plan's administration was nurtured by the Legal Aid Committee of the Law Society and its Chair, Mary Eberts, and the Law Society's Clinic Funding Committee and its Chair, Paul Copeland, to whom we are also very grateful.

Members of the Review and our staff also profited greatly from numerous conversations with members of the Bench and bar, government officials, academics, researchers, members of legal organizations and community groups, and other concerned individuals who simply telephoned or wrote letters to the Review. Though it would be impractical to attempt to list these individuals, we are most appreciative for all of this assistance.

The organization and carrying out of the work of the Review required an expert and dedicated staff. Our Executive Director, and Senior Counsel, Lori Newton played a pivotal role, as did our Counsel, Aneurin Thomas. Karen Andrews, of the Ontario Bar, and

Sarah Pearce, LL.B., provided valuable assistance in the latter stages of our work. We are very grateful to our Administrative Assistants, Tina Afonso and Cora Calixterio, whose tireless devotion to the many tasks at hand kept our heads above water throughout the exercise, to Margot Hall, who provided similarly valuable assistance to Professor Trebilcock, and, to Felicidad Gerona who assisted in the early stages of our secretarial work. We note, as well, our indebtedness to Sam Samanta of the Ministry of the Attorney General who assembled relevant statistical information for us, and to our editors Beverley Endersby and Doreen Potter who skilfully edited a large volume of material in a very short period of time.

While the Review is most appreciative of the support and assistance of all of the above-named and unnamed individuals, we accept, of course, full responsibility for the recommendations we have made in this report, with respect to which we are unanimous.

August 1997

MEMBERS OF THE ONTARIO LEGAL AID REVIEW

JOHN D. MCCAMUS, *Chair*

John D. McCamus is a Professor of Law at Osgoode Hall Law School of York University, a faculty which he served as Dean from 1982-1987. His educational background includes degrees in philosophy from the universities of Western Ontario and Toronto and in law from the universities of Toronto and London. Prior to joining the faculty at Osgoode, he articled with the Toronto law firm, Fasken & Calvin, and served as a law clerk at the Supreme Court of Canada for Chief Justice Laskin. Professor McCamus served, from 1993 to 1996 as Chair of the Ontario Law Reform Commission. At Osgoode, his principal areas of research and teaching have included private law, especially restitution and contract, commercial law and information practices law. His published work includes a text, co-authored with P.D. Maddaugh, *The Law of Restitution* (1990).

SUSAN J. BRENNER

Susan J. Brenner is a sole practitioner in Barrie, primarily in the area of family law. She graduated from the Faculty of Law of the University of Windsor in 1975. Prior to moving to Barrie, Ms. Brenner was a sole practitioner in Toronto. In 1994, she served as Vice-President of the Simcoe County Family Law Lawyers' Association.

THE HONOURABLE MADAM JUSTICE JOAN L. LAX

Madam Justice Lax is a judge of the Ontario Court (General Division). She was called to the Ontario bar in 1978 and joined the Toronto law firm, Weir & Foulds, where she practised in the courts and before administrative tribunals. In 1986, she was appointed Assistant Dean & Director of Admissions at the Faculty of Law, University of Toronto where she was engaged in administration and teaching until she was appointed a judge in January, 1996. From 1991 to 1995, Justice Lax was an elected bencher of the Law Society of Upper Canada and served on numerous committees, including the Clinic Funding Committee, which is responsible for the community legal clinic system in Ontario. She chaired this committee from 1993 to 1995. She has also served as a Trustee of the Law Foundation of Ontario as well as on a variety of projects concerned with legal education, public interest advocacy and the justice system.

SHERRY PHILLIPS

Sherry Phillips is Director of Community Health Promotion Programmes at the Lawrence Heights Community Health Centre in Toronto. Between 1992 and 1995, Ms. Phillips worked with the National Union of Eritrean Women in Eritrea as a volunteer researcher, project developer and skills trainer. She has also worked as a volunteer, programme coordinator, and Board Member of the Eritrean Relief Association in Canada, Toronto office. Ms. Phillips is in the process of obtaining a Master's Degree in Environmental Studies from York University. Ms. Phillips has worked as a teaching assistant with the Department of Anthropology at York and has extensive academic research and volunteer experience.

DAVID I. RICHARDSON

David I. Richardson, a senior partner with Ernst and Young, was appointed by the Ministry of the Attorney General in January 1996 as the independent monitor of the Ontario Legal Aid Plan (OLAP). As independent monitor, he works with the Law Society of Upper Canada and the Ministry of the Attorney General in reviewing and reporting on the Plan's expenditure control mechanisms, management and systems. As the Chair of Ernst & Young Corporate Recovery and Insolvency arm, he specializes in large and complex corporate debt restructuring, and advising governments, secured creditors and debtors on insolvency and re-organization matters generally.

THE HONOURABLE JUDGE JOSEPH B. WILSON

Judge Joseph Wilson was appointed to the Provincial Court on May 26, 1997. Called to the Bar in 1974, he articled with, and then was a member of, the Barrie law firm of Livingston, Myers and Cockburn. In March of 1975, Judge Wilson set up his own firm in Parry Sound where he had a general practice. Up to the time of his appointment, he also acted as a part-time assistant Crown Attorney, a Deputy Judge of the Small Claims Court, and the Parry Sound Area Director for the Ontario Legal Aid Plan. He was the President of the Area Directors' Association from 1995 to 1997. Judge Wilson was also a member of the executive of the Parry Sound Law Association since 1980 and Vice-President for the past few years. From January of this year until his appointment, he was the President of that group.

GEOFFREY ZIMMERMAN

Geoffrey Zimmerman is a Newmarket criminal lawyer and recently held the position of Regional Director of the Criminal Lawyers' Association. A graduate of the Faculty of Law at Queen's University, he served as an Assistant Crown Attorney in Toronto from 1986 to 1987. He moved to private practice in 1987, and served as Standing Agent at Newmarket for the federal Department of Justice from 1988 to 1995. Mr. Zimmerman also served as a Director of the York Region Law Association from 1989 to 1991.

INTRODUCTION

1. THE ORIGINS AND PURPOSES OF THIS REVIEW

The Ontario Legal Aid Review was established by the Attorney General of Ontario on December 13, 1996, with a mandate to undertake a thorough analysis of the various programs that comprise the current legal aid system in the province and to make recommendations regarding the future direction those programs should take. Although the various aspects of legal aid system in Ontario have been the subject of numerous studies over its three decades of existence, recent events suggested a fresh examination—for the first time since 1965, on a comprehensive scale—would be timely and appropriate. An understanding of the purposes of this Review rests on an understanding of the origins and nature of the legal aid system in Ontario.

When the Ontario Legal Aid Plan was established in 1967, its structure reflected three cardinal principles. First, the program services to be made available to low-income Ontarians were to be delivered according to what has come to be known as the judicare model. That is, services would be provided by private members of the practising bar in Ontario on the basis of certificates issued by the Plan to persons eligible for legal aid. Lawyers delivering services on this basis would be compensated by the Plan at legal aid tariff rates.

The second important principle was that the legislation creating the Plan envisaged that eligible individuals are entitled to legal aid. Thus, the enabling legislation conferred a right to legal aid upon eligible persons. As a result, the cost of the legal aid system to the provincial government was demand-driven. The more eligible people who sought and obtained certificates, the greater the expenses of the Plan in any particular fiscal year. In this respect, legal aid was not unlike a number of other benefit programs established in Ontario and elsewhere during this period.

The third principle was that the Plan operated as a partnership between the province, which funded the Plan and the Law Society of Upper Canada, the governing body of the legal profession, which was assigned responsibility for administering the Plan.

These central features of the Ontario legal aid system had obvious implications for the way in which the Plan functioned. The Law Society ensured that the Plan issued certificates to eligible persons and that its members provided services to low-income Ontarians on the basis of those certificates. For its part, the province paid all of the accounts rendered by service providers during each fiscal year. Although the costs in any particular fiscal year might exceed, perhaps dramatically, the resources allocated to legal aid in a previous year, this

would not result in the plan being “over budget” in any meaningful sense. The notion of a “cost overrun” simply has no meaning in a demand-driven entitlement system of this kind.

During the past thirty years, methods of delivering legal aid services other than the certificate system have been devised. At an early stage, the Plan implemented and later expanded a series of duty counsel operations which typically provide advice at the courthouse in criminal law and family law cases. As well, beginning in 1971, a system of community clinics was instituted in the province offering what is often referred to as “poverty law” services in fields of law, other than family law and criminal law, which have significant impact on the lives of low-income Ontarians. Unlike the certificate program, the community clinics have always operated under funding caps: both for the system and for individual clinics. For the most part, however, provision of services on a judicare basis has remained the central feature of the Plan and the legislation upon which it is founded.¹

The demand-driven, entitlement nature of the certificate part of the Plan had serious implications for the way in which the Plan was managed and for the arrangements concerning its annual budget. For example, as the Plan did not attempt to maintain accounts of accrued liabilities for work done but not yet billed, at any particular time, the Plan would not be able to estimate precisely its outstanding liabilities. There was simply no need for such information under a Plan with open-ended funding and for which, the province simply paid, on a cash basis, the accounts rendered during a particular fiscal year. From the perspective of the provincial government, of course, social programs of this kind complicated its own budgeting and planning exercises.

Economic downturns at the opening and closing of the 1980s weakened the enthusiasm of many governments in Canada and elsewhere for open-ended funding for programs of this kind. It is increasingly the case in Ontario and elsewhere that such programs are being brought under fixed annual budget allocations, or “caps”. The moment for capping the legal aid system in Ontario arrived rather abruptly in 1994, when, after a period of dramatic escalation in the annual cost of the judicare side of the system, the province of Ontario imposed a cap on the funding of the certificates program. At that time, a Memorandum of Understanding (MOU) was entered into between the Law Society, as manager of the system, and the government of Ontario. The MOU was to govern the relationship between the Society and the province with respect to legal aid for a five-year period, until March 1999. Under the MOU, it was agreed that there would be a fixed annual budget for the provincial contribution to the Plan during this period. The annual provincial contribution was specifically identified and the amount of those contributions was to decline throughout the five years covered by the MOU.

The transition, on short notice, from an open-ended system to a capped system could not be expected to be smooth and, indeed, it was not. As we document in this Report, the imposition of a budgetary cap sent a series of shock waves through the administration of the Plan and its service-delivery systems. After an initial period of uncertainty regarding the ability of the Plan to cope with such a dramatic change in its structure, the situation stabilized inasmuch as it became apparent that the measures being undertaken by the Plan would likely enable it to meet the budgetary objectives set out in the MOU.

¹ *Legal Aid Act*, R.S.O. 1990 c. L.9.

With the legal aid system having reached a period of stability in financial matters at least, and with a further twenty-seven months before the expiry of the MOU in March 1999, this Review was established at the end of 1996 with a mandate to consider all aspects of the legal aid system in Ontario and, more particularly, to evaluate what implications the imposition of capped funding would have on the system's future design, administration and governance. The Review was set up as an independent task force in the sense that its members are employees of neither the public service nor the Plan, and in the sense that no constraint was placed on the nature of the advice we might give in carrying out our mandate. The members of the Review include a judge of the Ontario Court (General Division); three practising lawyers, one of whom has since become a judge of the Ontario Court (Provincial Division); one of whom practices criminal law and another of whom practices family law; an accountant who currently serves as the Ministry of the Attorney General's monitor of the Plan; a community development worker associated with a community health centre; and, as Chair, a law professor who recently served as Chair of the Ontario Law Reform Commission. The Review was asked to complete its work by the end of June 1997.

2. THE TERMS OF REFERENCE OF THE REVIEW

The Terms of Reference of the Review are both comprehensive and, especially in light of the short timeline established for the completion of its task, rather challenging. The mandate and scope of the Review were described in the following terms:

Mandate

A comprehensive review of legal aid in Ontario will be undertaken. The review will consider all legal aid programs in the province with the objective of identifying aspects that should be reduced, maintained, or enhanced, including new ideas in the management and delivery of legal aid in order that the current and future legal needs of low-income residents of Ontario can be met in the most effective and efficient way possible within the existing funding allocation.

Scope

The legal aid system will continue to have a fixed, not open ended, budget from the provincial government. The legal aid system should be flexible enough to adjust to the possibility that provincial and federal resources currently dedicated to legal aid could be reduced, maintained, or enhanced as well as to the fluctuations in the need for legal aid services.

The government has initiated a fundamental transformation of the justice system in Ontario in order to create more focused, better integrated institutions and procedures. Examples of these changes include the Criminal Investment Strategy and the Ministry's Business Plan. The report will ensure the legal aid program reflects this new direction without compromising the program's independence or client interests.

As well, the Review was invited to consider the existing needs for legal aid services; the range of possible delivery models, or combinations of them, that might be responsive to those needs; the problem of establishing priorities for the delivery of legal aid services within and among various areas of substantive law; and finally, various issues relating to the administration and governance of the legal aid system, most particularly, the question of what

body is the most appropriate to be responsible for the governance of the legal aid system. In addition, the Terms of Reference of the Review suggested a range of methodologies that might be used to carry out this assignment and, further, undertook to provide the necessary support for a program of research and consultation.

3. THE ORGANIZATION OF OUR WORK

In an attempt to inform ourselves as fully as possible about the current challenges facing the legal aid system in Ontario, and to obtain as broad a range of advice as possible regarding the potential means of meeting those challenges, we adopted three strategies.

First, we extended an open invitation to all interested parties to make written submissions to the Review. Second, we organized a series of public meetings and meetings with key stakeholder groups across the province. Third, we engaged the services of a Director of Research and, in collaboration with him, retained a number of consultants to prepare background papers on various topics related to the mandate of the Review. A brief description of our implementation of these strategies follows.

In order to facilitate wide participation in our consultative process, we prepared and distributed across the province early in 1997 a discussion paper requesting submissions in writing to the Review by the middle of March. The discussion paper provided background information concerning the current operation of the legal aid system in Ontario. It then identified a number of consultation questions concerning such issues as client needs, the goals of the legal aid system, the range of coverage of the system, the types of delivery models to be used, clients' financial eligibility, the impact of the recent budget constraints, the financing of legal aid, the relationship of legal aid to the larger justice system, and various questions relating to the management and governance of legal aid. The response was remarkable. Over the next few months we received more than 170 written submissions from a broad range of sources: briefs from major legal organizations, including two lengthy briefs from the Law Society; from many clinics, and an umbrella committee for the clinic system; from many Area Directors of the Plan; from a variety of groups representing the interests of the clients of legal aid; from a committee of judges of the Ontario Court (Provincial Division), from individual lawyers and other professionals with an interest in legal aid issues; and from individuals who wished to recount their experiences of and encounters with the legal aid system. We have attempted to summarize this rich harvest of information and advice in Appendix A to this report.

In addition to reviewing written submissions, members of the task force believed that it would be useful to meet with individuals who have an interest in the legal aid system, whether as service providers, administrators, clients, or individuals working in other social service fields who have contact with the clients of legal aid. Accordingly, we organized a series of public meetings across the province. Hearings of this kind were held in Barrie, London, Ottawa, Sudbury, Thunder Bay, Windsor, and Toronto. In each centre, we scheduled meetings with community groups, groups of lawyers, Area Directors, clinic directors, duty counsel, women's groups, and other client-related organizations. As well, we held walk-in sessions for members of the local bar and, in the evenings, open public meetings. In each community, we typically visited courthouses, met with judges, and, to the extent possible, observed proceedings. In Toronto, we made two planned visits to courthouses, observed proceedings, sat in with duty counsel as they interviewed clients, and held discussions with members of the

judiciary. In Toronto, as in other communities, we attempted to meet with stakeholder groups as well as members of the general public. Two evening public sessions were held at community centres in Toronto.

Our meetings across the province were undertaken with a view to determining whether, as we suspected, the challenges facing the legal aid system vary to some extent from one community to the next, and with a view to learning more about those challenges in particular community settings. To make only one obvious comparison, the problems of providing legal aid services to Aboriginal communities in Northern Ontario, about which we learned a good deal in our consultations in Thunder Bay and Sudbury, differ significantly from those of providing family law legal aid services in larger urban centres such as Ottawa and Toronto. The challenges may be equally daunting, but they are very different in nature.

Members of the task force found this consultation process to be a very informative and helpful one. We came away from this exercise with our understanding of the operation of the current legal aid system much increased. Further, we developed a stronger sense of the profound impact that the recent service cuts have had on individuals and their families, and indeed on the administration of justice as a whole. We were impressed, as well, by the strong sense of dedication and commitment we sensed on the part of both service providers and others connected with the legal aid system. We also became very aware of the level of frustration that many are experiencing in attempting to meet the legal needs of low-income Ontarians at the present time.

Further, we came away with a very strong sense of appreciation for the high level of cooperation afforded to us by those who made written submissions, by those who participated in public hearings and stakeholder meetings, and especially, by those individuals across the province who kindly assisted in organizing the sessions.

Our research program was designed to provide the Review with a base of information and analysis that would further facilitate the deliberations of the members of the Review. Thus, background papers were commissioned that would analyse various issues relating to the governance of the legal aid system, the range of possible delivery models for providing publicly funded legal services, and the considerations weighing in favour of and against use of particular models in particular contexts. Still other papers were commissioned to provide us with advice with respect to the legal constraints arising from Canadian constitutional law and other legal sources on the province's ability to design its legal aid system, and on the manner in which legal aid services are organized and provided in other jurisdictions. Another paper analysed, from the perspective of political or democratic theory, the underlying rationale for publicly funded legal services and related this analysis to the problem of priority-setting in the legal aid context.

Another series of papers provided case studies in various areas of service delivery. Papers examined the major areas of expenditure by the system—namely, criminal law, family law, “poverty law” and immigration and refugee law. Advisory Teams, the members of which are listed in Appendix C, were established for each of these case studies. More specific studies were undertaken on subjects we believed had not received sufficient attention either in the existing literature or in the materials we assumed would be presented to the Review during the consultation process. Two papers were commissioned on issues relating to delivery of services to Aboriginal communities in Northern Ontario and to Aboriginal persons living in urban centres. Another paper focused on the particular problems in obtaining legal aid services

experienced by individuals suffering from mental disabilities in various contexts. Finally, a paper was commissioned to address various issues relating to the existing needs for legal aid services and the manner in which those needs might, over time, be examined and assessed. As well, this paper presented as much information as could be gained in a relatively short period of time concerning the impact of recent funding constraints in Ontario on the delivery of legal aid services.

The high level of cooperation we enjoyed in our consultation process was equalled in our research program. The researchers who agreed to assist us in our work undertook, on very short notice, very burdensome assignments with unusually short timelines. They provided us with a body of work which has not only greatly informed our deliberations, but has, as well, made a significant contribution to the analysis of policy issues concerning legal aid. These background papers are reproduced in volumes II and III of this report.

A question often asked of us during our consultations concerned the relationship of this Review to the study of legal aid prepared by Professors Zemans and Monahan of Osgoode Hall Law School, York University, which was released in March 1997. The short answer is that there is no formal connection between the two studies. The study by Professors Zemans and Monahan was undertaken on their own initiative, and funded by a private foundation grant. This Review was established by the Attorney General as an independent task force, funded by the Ministry, charged with the task of providing the Attorney General with advice on reform of the legal aid system. We wish to acknowledge, however, our indebtedness to the work of Professors Zemans and Monahan. Once the Review was established, they kindly made their own research papers available to us, including a number of studies on legal aid in other jurisdictions. The publication of the Zemans and Monahan study was also helpful to us as it further provoked and contributed to public discussion of legal aid issues in the midst of our program of public consultations. Although there was thus no formal connection between the two studies, attempts were made by the Review to avoid duplication of research efforts and to profit from the public discussion flowing from the publication of the Zemans and Monahan study.

4. THE PLAN OF OUR REPORT

Part I of this report provides an account of the historical background of legal aid in Ontario and an analysis of critical policy issues relating to legal aid. Chapter 2 summarizes the history of the legal aid system in Ontario and the recent events briefly alluded to above. As well, we attempt in chapter 2 to identify the primary factors that contributed to the dramatic increase in expenditures on the judicare system during the late 1980s and early 1990s. Against this background, chapter 3 profiles the current legal aid system in the province, its legislative framework, system of governance, delivery models, sources of funding, the case types for which services are provided, and the manner in which eligibility for legal aid is determined.

The remaining chapters in Part I address a number of analytical issues that, in our view, must be accommodated by the designers of a legal aid system. Chapter 4 discusses the kinds of occasions in which low-income Ontarians experience a need for legal services and considers, as well, various difficulties associated with the question of identifying and quantifying such needs. Chapter 5 attempts to identify a principled basis for setting priorities for service delivery in a legal aid system. Chapter 6 places the legal aid system within the context of the larger justice system and considers the implications for the legal aid system of the fact that

legal aid expenditures are, to a considerable degree, contingent upon the general structure of the administration of justice within the province. More particularly, this chapter considers what the role of a legal aid system ought to be in promoting change within the larger system to facilitate better access to justice and a more efficient delivery of legal aid services. Chapter 7 provides an extensive analysis of delivery-model issues, canvassing the broad range of possible delivery models that might be deployed by a legal aid system and assessing the considerations that weigh in favour of or against their use in particular service contexts.

Part II of the Report sets out our plan or blueprint for the legal aid system in Ontario, drawing together and articulating the lessons we have learned or the principles we have drawn from our examination of the current legal aid system in Ontario and from our examination of the various issues explored in various chapters of Part I. In chapter 8, we urge upon both the legal aid system and the province a renewed commitment to legal aid in the form of an exchange of commitments drawn from these basic principles. We recommend that a number of commitments be made on behalf of the legal aid system with respect to its functioning, and, as well, a corresponding set of commitments be made on the part of the province. Thus, we encourage a shared and fundamental agreement on the basic mandate of the legal aid system. We believe that a renewed set of commitments of this kind is essential to maintaining a legal aid system that can deliver high-quality legal services to low-income Ontarians across the broad range of service areas.

In the subsequent chapters of Part II, we attempt to work out the implications of these principles or commitments for service delivery in particular areas. Chapters 9 to 13 cover the main service areas of the existing legal aid system: criminal law, family law, “poverty law”, immigration and refugee law, and so called “other” civil law. A number of service-delivery themes emerge from these case studies. We have attempted to propose delivery models that will promote early identification and assessment of the legal needs of potential clients, facilitate diversion to non-legal service providers where appropriate, and manage the intake of eligible clients into the legal aid system based on their needs and a clear, principled set of priorities for the system. Our proposals are designed to promote early resolution of legal matters and the provision of targeted and appropriate legal assistance across the full range of legal needs. We have proposed an expansion in the mix of available service providers in order to improve quality of service, promote cost-effectiveness, increase accessibility, and allow legal aid managers to evaluate the operation of alternative delivery models. Finally, we have attempted to conceive a system designed to ensure flexibility and to identify and meet priorities and changing needs within a capped budget.

In chapters 14 and 15, we turn to issues relating to the funding of the legal aid system and its governance. In chapter 14, we suggest a number of measures designed to strengthen the system’s financial-planning capacity. In chapter 15, we attempt to identify the ideal characteristics of a governance model for legal aid, and then consider whether a larger set of those characteristics can be captured by establishing a new governance model for the legal aid system in Ontario.

In brief, our deliberations have led us to conclude that the major challenges confronting the legal aid system can best be met by undertaking a substantial rethinking of the structure of the system and its methods of accommodating the needs of low-income Ontarians for legal services. Having made such proposals, we came to the view that it would be appropriate to demonstrate that a practical and financially feasible plan could be developed for implementing

proposals of this kind in a reasonably short timeframe. This we have attempted to do in chapter 16.

At the end of each chapter, we itemize the recommendations made in that chapter. Part II of the report is followed by the Summary of Recommendations, which sets out a complete list of the Review's recommendations.

PART 1: HISTORICAL AND ANALYTICAL FRAMEWORK

CHAPTER 2

DEVELOPMENT OF THE LEGAL AID SYSTEM IN ONTARIO

This chapter outlines the development of legal aid in Ontario between 1951 and 1994, the challenges to the viability of the system in the 1990s, and the possible explanations for the increasing legal aid expenditures in the early 1990s and provides a comparative analysis of responses to the growth in legal aid in other jurisdictions.

1. DEVELOPMENT OF LEGAL AID IN ONTARIO, 1951-1990

This section reviews the history of the development of legal aid in Ontario between 1951 and 1990. This history can be divided into three periods, each of which represents a distinct era in the evolution of Ontario's legal aid system.

During the first period (1951-66), both the provincial government and the legal profession viewed the provision of legal services to low-income Ontarians largely as a charitable activity. However, at the close of this period, both had come to the conclusion that a charitable scheme was insufficient to meet the demand for legal aid services and had appointed a joint committee to develop a new system.

The modern Ontario Legal Aid Plan was established in the second period (1967-79). During this period, a number of other important developments took place that continue to influence the provision of legal aid services today, including the establishment of a statutory right to legal aid in a broad range of legal proceedings, governance of the Plan by the Law Society of Upper Canada, "open-ended" funding for the Plan's certificate program, and the instituting of a "mixed" model of service delivery. As well, important legislative/regulatory developments occurred during this period—namely, the promulgation of a new *Legal Aid Act* in 1967 and the Clinic Funding Regulation in 1979.

The third period (1980-1990) can be characterized as one of response to increasing needs for service in all areas covered by the Plan. The Plan's services and programs (and costs) grew substantially over this time. As a result, by the 1990s, the Plan was providing a wide variety of legal aid services to a substantial number of low-income Ontarians, but also faced serious governmental concerns about rapidly escalating costs.

(a) CHARITABLE LEGAL AID, 1951-1966¹

Ontario's first legal aid statute was the *Law Society Amendment Act, 1951*.² This Act mirrored a British statute passed two years earlier: the *Legal Aid and Advice Act*.³ The Ontario legislation provided for the province's first statutory legal aid plan, authorizing the Law Society to establish a plan to provide legal aid to persons in need thereof. The plan was to be called "The Ontario Legal Aid Plan".

Prior to 1951, legal aid in Ontario was offered informally. Legal services were provided to low-income Ontarians by members of the bar on a volunteer basis.⁴ The *Law Society Amendment Act* did not change this situation significantly. The Act specified that the Plan would pay volunteer lawyers only for their disbursements and other administrative expenses.

The *Law Society Amendment Act* also established the structure of the early Plan. The Act specified that the Plan was to be controlled by the Law Society, not the provincial government or a statutory agency. The Act stated that the Plan was to cover both civil and criminal proceedings, including all indictable offences punishable by imprisonment, and most civil cases, except defamation, breach of promise of marriage, and alienation of affection.⁵ Financial eligibility requirements were to be determined on the basis of annual income, number of dependants, and a discretionary "needs" test. The statute specified that the Plan was to be administered locally by county and district law associations.

By the early 1960s, it was obvious that a voluntary plan was incapable of meeting the demand for legal aid. There were simply not enough lawyers willing to provide their services voluntarily to make the program effective. As a result, in 1963 the provincial Attorney General established a Joint Committee of the Ontario government and the Law Society "to inquire into and report on the existing plan and put forward recommendations for its future".⁶ The Joint Committee was composed entirely of lawyers. The *Report of the Joint Committee on Legal Aid* was tabled in April 1965. The Joint Committee concluded

¹ See generally Abt Associates of Canada, *Comprehensive Review and Evaluation of the Ontario Legal Aid Plan: Project Report* (Ottawa: 1992); Frederick Zemans and Lewis T. Smith, "Can Ontario Sustain Cadillac Legal Services" (1994), 5 *Maryland J. Contemporary Legal Issues* 271.

² *Law Society Amendment Act, 1951*, R.S.O. ch. 207 (1960).

³ The British legislation implemented the recommendations of the *Report of the Committee on Legal Aid and Advice in England and Wales*, (hereinafter "Rushcliffe Report"), published in 1945. The Rushcliffe Report recommended the establishment of a limited legal aid program to be controlled by the British Law Society, not a government agency. Shortly thereafter, the Law Society of Upper Canada appointed a special committee, to examine the creation of a legal aid plan in Ontario, chaired by R.M. Willes Chitty. The Chitty Committee's report recommended the implementation of a scheme similar to that proposed by the Rushcliffe Report.

⁴ In some cases, the provincial Attorney General's Department provided financial assistance through payment of nominal *per diem* fees to volunteer lawyers. The Attorney General did not, however, pay counsel fees. There was no assistance for civil cases, although an individual lawyer could provide voluntary assistance if he or she chose to do so.

⁵ The Plan did not cover criminal or civil appeals, unless the Plan's Provincial Director was of the opinion that there had been a miscarriage of justice.

⁶ Ministry of the Attorney General of Ontario, *Report of the Joint Committee on Legal Aid* (Toronto: Queen's Printer, 1965) at 6.

that it was unreasonable to expect lawyers to be responsible for providing legal services, without payment, to low-income Ontarians.

Several of the Joint Committee's recommendations continue to influence the provision of legal aid services in Ontario to this day:

- The Joint Committee concluded that the provincial government was responsible for legal aid, pursuant to its constitutional responsibility to provide for the administration of justice.
- The Joint Committee concluded that the provision of legal aid should be considered a right, not a charitable gift. The Joint Committee therefore recommended that the Plan pay counsel fees in addition to disbursements for legally aided cases, and that legal aid services be delivered in a uniform manner across the province. This recommendation was premised on a belief that individuals were equal before the law only if they were assured representation by counsel, regardless of whether they could afford a private lawyer.
- The Joint Committee recommended that the Plan be funded by the provincial government and that it be administered by the Law Society. In this respect, the Joint Committee adopted, without comment, the "almost unanimous opinion that legal aid should continue to be administered by the Law Society".⁷
- The Joint Committee recommended that legal aid be provided by private lawyers. The Joint Committee rejected a "public defender" model, stating that "[it is] wrong in principle that both prosecutor and defender are employed by the same master".⁸ The Joint Committee also concluded that the impersonal nature of the public-defender model and its bureaucratic nature "prevented the public defender from exercising the zeal and vigour which should be characteristic of defence counsel in every case."⁹
- In order to make certain that recipients of legal aid would have their choice of counsel, the Joint Committee proposed that lawyers be reasonably compensated to ensure their participation in adequate numbers and to attract senior members of the bar. The Joint Committee concluded that lawyers should be paid the reduced rate of 75 percent of a normal solicitor and client account.
- The Joint Committee recommended the formal establishment of a "Duty Solicitor" scheme, whereby private lawyers were paid to attend in court in order to provide limited advice to those not yet able to retain counsel or obtain a legal aid certificate.
- The Joint Committee recommended that legal aid be provided for a broad range of criminal, civil, and administrative proceedings.¹⁰ Coverage for criminal and civil

⁷ *Ibid.*, at 49.

⁸ *Ibid.*, at 107.

⁹ *Ibid.*, at 105.

¹⁰ *Ibid.*, at 58-65.

proceedings had been a feature of the 1951 Plan; coverage for administrative proceedings had not. The Joint Committee justified the inclusion of administrative proceedings by stating that

Administrative tribunals exercise a large and increasing jurisdiction to deal with the rights of individuals in Ontario. There appears to be no logical reason why legal aid to persons affected by such tribunals should be excluded from the operation of an extended legal aid plan. The need for such might be just as great as it is before Courts of law.¹¹

The Joint Committee's recommendation that legal aid coverage should be extended to administrative tribunals was an explicit acknowledgement that the range of legal proceedings had expanded significantly as a result of the growth in governmental reliance on administrative agencies.

In recommending the establishment of a widely available, provincially financed legal aid program, the Joint Committee reflected then-current views on the appropriate role of governments in ensuring the well-being of their residents. For example, in the mid-1960s, the federal government introduced the Canada Assistance Plan (CAP), the *Medical Care Act* (establishing federal funding for health care), and the Canada Pension Plan; the provincial government introduced significant welfare legislation, including the Family Benefits Assistance and General Welfare Assistance programs. At the same time, a variety of legislative initiatives, including Ontario's first human rights code reflected a growing awareness of the situation of the economically disadvantaged. These developments significantly expanded the role of the federal and provincial governments in the field of social policy and the provision of equality-based rights. In this context, the establishment of a widely available, provincially funded legal aid program can be seen as a justice-related component of the modern state.

(b) ESTABLISHMENT OF THE MODERN ONTARIO LEGAL AID PLAN, 1967-1979

In the period from 1967 to 1979, a number of important developments emerged, including the passage of the *Legal Aid Act, 1967*. This Act specified that the governance of the Plan was to be undertaken by the Law Society and that the Plan was to be funded by the province on an "open-ended" basis. This period also saw rapid growth in the number of certificates issued and the development of a limited "mixed" model of service delivery.

(i) The *Legal Aid Act, 1967*

The provincial government accepted the Joint Committee's major recommendations, with the result that the first comprehensive legal aid statute in Ontario, the *Legal Aid Act, 1967*, was passed.¹² This Act established a statutory right to legal aid for individual applicants who qualified by virtue of the type of service they required and their financial circumstances.

The Act specified that the Plan was to issue a "legal aid certificate" to individuals who met the Plan's legal and financial qualifying criteria. Once issued, the certificate could be taken to any private lawyer in the province willing to accept it. The legislation and

¹¹ *Ibid.*, at 58.

¹² *Ibid.*

accompanying regulation specified that lawyers providing legal aid services were to be reimbursed by the Plan for both counsel fees and disbursements, according to a prescribed schedule of fees. The statute also established a limited duty counsel program.

Reflecting the Joint Committee's recommendation that the Plan cover a broad range of legal proceedings, the Act stated that certificates were to be issued as of right in a wide range of circumstances, most particularly in serious criminal offences and family matters in superior court. The Act also gave Plan administrators wide discretion to issue certificates in a variety of other circumstances. The Act prohibited the issuance of certificates in very few instances.

The Act also set out the Plan's basic governance and management structure, specifying that the Law Society would continue to administer and determine policy for the Plan. The statute stated that the Plan was to establish an office in each of the province's judicial districts. The Plan was to appoint an Area Director for each district, who would be responsible for administering the Plan at the local level.

Finally, the Act specified that the provincial government would fund the Plan.¹³ Importantly, the Act did not specify that the Plan was to operate on the basis of either a fixed number of certificates or a fixed annual budget. Rather, the Plan was funded on an open-ended or demand-driven basis. If the demand for certificates or their cost increased beyond the Plan's annual projections, the provincial government would fund the shortfall.

Since its passage in 1967, the *Legal Aid Act* has not been significantly amended. As a result, the basic governance framework, funding structure, and delivery models mandated by the original Act remain in place 30 years after its passage.

(ii) Growth of the Certificate Program

The Plan's certificate program grew rapidly. Barely three years after its inception, the Plan was issuing more than 40,000 certificates annually. By 1980, the Plan was issuing more than 83,000 certificates a year.

(iii) The Establishment of the Community Clinic Program and the Development of a Limited Mixed Model of Service Delivery in Ontario¹⁴

Despite the growing number of certificates, in the late 1960s and early 1970s many lawyers and community representatives concluded that private lawyers were not adequately addressing the legal needs of the low-income Ontarians.¹⁵ This conclusion was premised on two fundamental beliefs.

First, these analysts noted that the legal needs of people with low incomes were often very different from those of fee-paying clients. It was argued that the disadvantaged needed many services that were not available from the private bar—representation before administrative tribunals determining social assistance and workers' compensation, for

¹³ *Ibid.*, s. 5.

¹⁴ See generally, Zemans and Smith, *Can Ontario Sustain Cadillac Legal Services?*, and Mary Jane Mossman, "Community Legal Clinics in Ontario" (1983), 3 Windsor Yearbook of Access to Justice 375.

¹⁵ See e.g., Larry Taman, *The Legal Services Controversy: An Examination of the Evidence* (Ottawa: National Council on Welfare, 1971).

example. Indeed, the need for these services often arose simply by virtue of the clients' financial circumstances.

Second, these analysts believed that the very philosophy of traditional legal practice was largely inappropriate for low-income clientels. Traditional legal practice emphasized case-by-case litigation of discrete issues. It was argued that those of modest means should also be able to use the law as a means of achieving substantive, as opposed to procedural, equality. According to the traditional view, the potential scope of legal services needed by the disadvantaged was the same as for corporate, organizational, or more wealthy clients. As a result, critics of the existing Plan proposed a much different delivery model—the community legal aid clinic.

Clinics focused on “poverty law” services, emphasizing advice about and representation before the many new administrative tribunals that accompanied the development of the welfare state. Areas of practice included workers’ compensation, social assistance, children’s welfare, immigration, and landlord-and-tenant matters. Clinics also developed a much broader conception of legal services, including community legal education, law reform, and community development.

The early clinics’ unique focus was reflected in their governance structure and staffing policies. Clinics were governed by “volunteer community boards of directors” and were staffed by a combination of salaried lawyers and salaried “community legal workers” (CLWs). The CLW concept was new to the province. Neither lawyers nor administrative staff, CLWs rapidly developed expertise in specific areas of administrative law, as well as in working with individuals and organizations in the community.

The first general-service community legal aid clinic in Ontario was set up in 1971.¹⁶ Several other clinics followed. These early clinics were established outside of the existing Plan’s management structure and funded by a variety of charitable and government grants. As a result, the clinics had a considerable degree of independence, but no stable source of funding. At this time, the clinics were not formally organized into a “clinic system”.

Pressure mounted quickly on the provincial government to provide the clinics with funding. As a result, the Attorney General of Ontario appointed the Task Force on Legal Aid in 1973. The task force’s mandate was to review in depth the operation of the Legal Aid Plan in Ontario and determine the parameters of its future direction. The Task Force, chaired by the Honourable Mr. Justice John Osler, included other members, including several non-lawyers.

The Task Force’s report (the “Osler Report”)¹⁷ recommended a “mixed” delivery system for legal aid in the province whereby the existing judicare system would be supplemented by staffed neighbourhood legal clinics funded by the provincial government. Over time, the provincial government came to accept this recommendation. Interestingly,

¹⁶ Parkdale Community Legal Services was a pilot project initiated by Osgoode Hall Law School, York University and funded by the federal Department of Health and Welfare, the Council for Legal Education for Professional Responsibility, and York University.

¹⁷ Ministry of Attorney General of Ontario, *Report of the Task Force on Legal Aid* (Toronto: Ministry of the Attorney General, 1974).

the Osler Report also recommended that the governance of legal aid be transferred to a statutory commission—a recommendation that the provincial government did not accept.

Despite this official recognition, the Law Society initially opposed the widespread introduction of clinics in the province. The Law Society feared that clinics would usurp the role of the private bar, providing services that might otherwise be obtained through legal aid certificates or private retainers.

Ultimately, the Law Society and the provincial government reached a compromise. The Law Society agreed not to oppose provincial-government funding of community clinics in return for an implicit acknowledgement that clinics would be restricted to providing “poverty law” services, that is, services not offered by the private bar. The provincial government subsequently passed a regulation to the *Legal Aid Act* establishing provincial funding for the existing community clinics in the province.¹⁸

In 1978, the Honourable Mr. Justice Samuel Grange conducted another provincial inquiry into legal aid. Its purpose was to examine the relationship among the clinics, the Plan, and the private bar. Like the Osler Report, the *Report of the Commission on Clinical Funding* (the “Grange Report”) affirmed the mixed delivery system of legal aid in Ontario.¹⁹ The Grange Report concluded that community clinics played a significant role in Ontario’s legal aid system. Having found that the clientele and legal issues addressed by the certificate program and clinic program were very different, the report viewed the relationship between clinics and the private bar as complementary, not competitive.

In 1979, the Grange Report’s recommendations were incorporated into a regulation of the *Legal Aid Act* establishing a more elaborate structure for provincial funding of clinics. The new Clinic Funding Regulation stated that the Plan was to fund an “independent community-based clinical delivery system” and defined a clinic as an “independent community organization.”

The Grange Report had recommended that clinics have autonomy and independence in matters of policy and administration, “subject only to accountability for public funds advanced and for the legal competence of the services rendered.”²⁰ The Report had argued that autonomy in these matters was necessary to ensure community control and preserve the clinics’ legal-development and public-education mandate. Accordingly, the Regulation established the Clinic Funding Committee (CFC) as a standing committee of the Law Society separate and apart from the original Legal Aid Committee and provided it with a separate budget to be designated by the Attorney General. The decision to establish a separate governance and funding regime for the community legal clinics was significant. Clinic advocates feared that clinic independence and resources would be jeopardized if clinic governance and funding were subsumed into the mandate of the Legal Aid Committee, given that the Law Society and many of its members had not supported the development of the clinics. Generally speaking, the CFC was given the power to allocate

¹⁸ R.R.O. Reg. 557 (1970) as amended by R.O. 536 (1976).

¹⁹ Ministry of the Attorney General of Ontario, *Report of the Commission on Clinical Funding* (Toronto: Ministry of the Attorney General, 1978).

²⁰ *Ibid.*, at 22.

the funds designated for community clinics and to make policy in respect of their funding. As a result, the Regulation effectively shared the governance of community legal clinics between the CFC and each clinic's volunteer, elected community board of directors.

As with the 1967 *Legal Aid Act*, the major components of the 1979 Clinic Funding Regulation are still in place today.

(iv) The Cost of Plan Programs, 1970-1980

The increased need for certificates and the expansion of the community clinic program meant that the cost of the legal aid system rose considerably during this period, as is demonstrated in table 2.

Table 2.1: Total Number of Certificates Issued and Annual Cost of Plan 1970, 1975 and 1980²¹

Fiscal Year	Number of Certificates Issued	Number of Plan Funded Clinics	Total Plan Cost (\$ millions)	Cost of Certificate Program (\$ millions) ²²	Cost of Clinic Program (\$ millions)
1970	42,300	-	10.7	7.7	-
1975	72,715	-	19.4	13.7	-
1980	83,776	35	36.6	23.3	3.3

(c) SYSTEMIC GROWTH, 1980-1990

By 1980, the legal aid system's basic governance structure, funding regime, and limited "mixed" delivery model had been established. The Plan was administered by the Law Society and the certificate and community clinic programs had distinct governance and funding regimes reflective of their unique origins, mandate, and role within the larger system. The certificate system offered a wide range of legal services, providing legal advice and representation in "traditional" areas of law, including criminal, family, and other civil proceedings. All such services were provided by private lawyers pursuant to individual certificates. Conversely, the community clinic program focused on "poverty law" services, providing assistance otherwise unavailable from the private bar. Within this framework, the duty counsel program played a limited, but important, role, ensuring that individuals could obtain legal assistance before they were granted a certificate or able to retain private counsel.

During the 1980s and early 1990s, the certificate and clinic programs grew substantially, in terms of both of the range of services provided and their cost (see table 2.2).

²¹ This table summarizes data cited in the Ontario Legal Aid Plan Annual Reports. All figures are in nominal dollars.

²² This figure includes only the cost of fees and disbursements paid to private lawyers. It does not include administrative or other costs which could also be attributed to the certificate program.

Table 2.2: Total Number of Certificates Issued and Annual Cost of Plan Programs 1980-1990²³

Fiscal Year	Number of Certificates Issued	Number of Clinics Funded by Plan	Total Plan Cost (Millions of Dollars)	Certificate Program Cost (Millions of Dollars) ²⁴	Clinic Program Cost (Millions of Dollars)
1980	83,776	35	36.6	23.3	3.3
1985	87,531	47	69.9	43.3	9.8
1990	132,439	66	173.8	123.1	22.1

In the early 1990's more than 100 communities in Ontario were being served by 70 clinics, including both general and specialty clinics. General clinics offered services in core areas of "poverty law" practice. Specialty clinics provided assistance within a particular area of law or the legal needs of a specific client group. Examples of specialty clinics included the Advocacy Centre for the Elderly, the Advocacy Resource Centre for the Handicapped, and Justice for Children and Youth.

This period also saw the federal government assume an increasingly important role in legal aid funding. The federal contribution to Ontario's legal aid system was provided through federal - provincial cost-sharing agreements, originally just for criminal law matters, but later for civil matters as well.

2. CHALLENGES TO THE VIABILITY OF THE LEGAL AID SYSTEM, 1991 TO THE PRESENT

This section discusses the history of the Plan between 1991 and the present. This period is marked by the Plan's efforts to reconcile two competing goals: meeting the growing need for services in a time of economic recession and increasing legal complexity, and responding to the government's desire to limit the cost of the provision of such services. As is explained below, this period saw the provincial government's share of legal aid funding increase substantially in both absolute and relative terms. This situation was the result of both the unique "open-ended" nature of the *Legal Aid Act* and the fact that federal government funding began to provide fixed amounts unrelated to growth in demand for legal aid. As a result, the provincial government was left to absorb most of the increased cost.

To observers of the legal aid system in Ontario, the basic elements of this history are well known. In the early 1990s, costs for the certificate side of the Plan grew dramatically in light of the unprecedented demand occasioned by the recession and changes in the law. In 1994, the provincial government and the Law Society negotiated a four-year Memorandum of Understanding (MOU) which established fixed, and declining, levels of provincial funding for the certificate program. In return for the provincial commitment to provide fixed funding for the program, the Law Society agreed to manage the program within the limits of that funding. Unfortunately, the program's costs rose far above initial projections,

²³ This table summarizes data cited in the Law Society's Legal Aid Plan Annual Reports.

²⁴ This figure includes only the cost of fees and disbursements paid to private lawyers. It does not include administrative or other costs which could also be attributed to the certificate program.

and the Law Society responded with severe service cuts. With the passage of time, it is clear that these developments represent a watershed in the history of the Plan.

Much of the history of the Plan during this period has been summarized elsewhere and will not be repeated in detail here.²⁵ However, it is important that several key elements of this history be reviewed here as they relate directly to the Plan's current situation. Thus, this discussion concentrates on the Plan's pre-MOU cost-cutting measures, the origins of the MOU, and the Plan's post-MOU efforts to live within a capped budget.

In the early 1990s, the administrators of the certificate program were asked by the government to implement cost-saving measures to respond to increases in demand and costs. The Plan responded by introducing a number of initiatives that sought to improve access to justice services and to stabilize rising costs. These included:

- expediting the collection of outstanding lien money;
- commitments to setting up a limited number of Staff Office pilot projects;
- strengthened efforts by the Plan to prevent and detect abuse through its Investigations and Complaints Department;
- expanded centralized research facilities;
- improved payment agreements between legal aid clients and the Plan and a uniform provincial policy resulting in increased client contributions;
- reduced legal aid eligibility for driving offences where there was no direct impact on the applicant's livelihood;
- streamlining of the financial-eligibility assessment function in order to improve processing efficiency, including transfer of the responsibility for financial-eligibility assessment from the Ministry of Community and Social Services to the Plan;
- capping of lawyers' incomes from legal aid, and a graduated reduction of lawyers' fees beyond certain levels;
- expansion of cost-saving family law settlement conferences province-wide, with the objective of arriving at early settlement of outstanding issues without recourse to the courts;
- reduction in the criminal legal aid tariff by 5 percent for the period November 1, 1992, to April 30, 1994, and criminal tariff restructuring (e.g., elimination of larger block fees in cases where there is a guilty plea).

At the same time, the provincial government also initiated measures designed, in part, to reduce legal aid costs, including Crown screening and early resolution of criminal cases. The provincial government also attempted to negotiate with the federal government a commitment to provide additional funding to offset the significantly increased costs resulting from federal policy changes in refugee matters. The latter efforts were not successful.

²⁵

For a comprehensive history of this period, see F. Zemans and P. Monahan, "From Crisis to Reform: A New Legal Aid Plan for Ontario (North York, Ont.: Osgoode Hall Law School, York University Centre for Public Law and Public Policy) and Law Society of Upper Canada (1997), submission to the Ontario Legal Aid Review.

(a) ESCALATING COSTS IN THE 1990S: THE ORIGIN OF THE MEMORANDUM OF UNDERSTANDING

These initial efforts did not diminish the trend in overall legal aid expenditures. In hindsight, it is clear that, in the early 1990s, the Plan faced a range of often unavoidable fiscal pressures, including increasing demand for legal services resulting from demographic and economic changes, declining sources of non-provincial government funding for legal aid, and increasing cost and complexity of legal aid cases. Thus, example, by fiscal year 1993/94, the financial pressures on the certificate program continued to increase as the province remained mired in a recession, and court decisions on matters such as delay and disclosure, and prosecution policies in sexual assault matters, drove demand and costs up almost 20 percent from the previous year, to \$321 million.²⁶

In response, the provincial government made an unprecedented decision in 1993/94 not to provide additional funding for approximately 40,000 unpaid lawyers' accounts at the end of the fiscal year, and to require the Plan to carry them over into the 1994/95 budget. In all previous years, the province had provided an additional subsidy to meet any funding shortfall. In addition, the provincial government announced that it planned to reduce the Plan's allocation for certificates in the 1994/95 fiscal year by \$26 million, resulting in an anticipated \$75-million deficit at the commencement of that fiscal year. The government's decision not to provide additional funds was widely criticized by many legal aid practitioners, members of the judiciary, and potential legal aid clients. These groups argued that the decision was unfair, and illegal, and foreshadowed the end of Ontario's legal aid system. Moreover, it was clear that reductions in legal aid funding would have a negative impact on the day-to-day operations of the entire justice system as persons without assistance struggled to deal with the system's complex rules.

The government's decision not to provide new funds for the legal aid deficit had immediate consequences for both the provincial government and the Law Society. Lawyers were demanding timely payment of their outstanding accounts. Moreover, the carryover of such a large number of accounts put great pressure on the 1994/95 budget, which already had liabilities accruing from unbilled, but active certificates granted in 1993/94. Unless demand-reduction or cost-saving efforts were implemented, a legal aid crisis appeared to be imminent. The Plan would be forced either to further delay payment of its outstanding accounts or to stop providing certificates. Given that earlier attempts by the Plan to control its escalating budget had been unsuccessful, structural changes to the program seemed necessary.

(b) THE SIGNING OF THE MEMORANDUM OF UNDERSTANDING, SEPTEMBER 8, 1994

On September 8, 1994, a Memorandum of Understanding (MOU) signed between the Law Society and the provincial government fundamentally altered the legal aid program in Ontario. For the first time since its inception, the Plan was required to function within a pre-set funding level for certificates. This replaced the demand-driven funding structure described above. Under the MOU, as with community legal clinics, the Plan's budget would

²⁶

Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report 1993* (Toronto: The Law Society of Upper Canada, April 1, 1994) at 24.

have an annual cap, meaning that services or fees would have to be reduced if demand exceeded the estimated volume or if the cost per-case-rose.

The MOU gave the Plan an unprecedented four-year funding commitment and loan guarantee to cover the 1993/94 deficit for the Plan, and set out the Law Society's commitment to manage within those allocations. The MOU provided that the Plan's funding allocation for certificates would be reduced from \$194.7 million in 1994/95 to \$167.2 million in 1998/99, amounts which, based on the estimates of costs and demands made by the Plan at the time, appeared to be achievable without major service reductions or other changes to the Plan's operations.

Particularly important from the Law Society's perspective, the MOU introduced an integrated justice strategy. To help ensure that the Plan could operate within the reduced funding levels, the government promised in the MOU to implement diversion programs and a criminal law investment strategy (e.g. early Crown charge screening). These were intended to reduce the criminal case-load by focusing prosecution resources on serious crime and diverting more minor offences earlier in the process, thus helping to reduce legal aid costs. For its part, the Law Society agreed to control expenditures through such measures as implementing restrictions on interim accounts, adopting changes to the tariff, reducing administrative costs, adjusting or delivering its services to clients in different ways, although not radically altering the present delivery system, with its primary reliance on the judicare model, over the next four fiscal years.

(c) THE AFTERMATH OF THE MEMORANDUM OF UNDERSTANDING: MANAGING THE CAPPING OF THE LEGAL AID SYSTEM

At the time of the signing of the MOU, the government and the Law Society anticipated that, based on identified trends, a reduction in the number and cost of certificates issued, combined with the implementation of a modest management plan, would ensure that the Plan would stay within the fixed funding levels set out in the agreement without having to reduce services or fees significantly. Unfortunately, legal aid certificate costs continued to rise, and the certificate-side deficit grew. As a result, the Law Society developed and implemented more radical structural changes to the legal aid program than had been initially anticipated.

Table 2.3 outlines the number of certificates issued and cases completed since the signing of the MOU and the predictions relied upon at the time of the signing of the MOU.

Table 2.3

Actual Number of Certificates Issued by Plan as Compared to MOU Predictions ²⁷					
Number of Certificates Issued	1994/95	1995/96	1996/97	1997/98	1998/99
(a) Per Plan (actual)	174,120	129,683	80,000	-	-
(b) Per MOU (projected)			154,000	154,000	154,000

The Law Society made its first major effort to cut costs in the late summer/fall 1995, almost one year after the signing of the MOU. These measures were to amount to a

²⁷

Law Society of Upper Canada, Ontario Legal Aid Plan Annual Reports. This table summarizes data contained in the MOU.

reduction in expenditures of approximately \$40 million on an annualized basis. The initiatives included:²⁸

- elimination of divorce and wrongful dismissal certificates;
- stricter limits on granting criminal certificates (e.g. certificate issued only if there is a likelihood of incarceration, and loss of livelihood);
- tariff reductions (or elimination of payment) in relation to preparation time, use of interpreters, criminal pre-trials, travel costs, junior counsel rates, and a cap on individual and daily billings;
- budgetary guidelines for expensive criminal trials;
- introduction of a \$25 application/appeal fee;
- reductions in financial eligibility, and improvement in cost recovery;
- increased use of duty counsel in family and criminal cases.

The provincial government was not satisfied that the actions taken by the Law Society would achieve the goals set out in the MOU to stabilize the escalating legal aid costs. In September 1995, at the same time that the Law Society was implementing its first series of cuts, a Special Advisor to the Attorney General was hired to provide advice on the ability of the Law Society to manage the certificate program within the terms of the MOU. The special advisor appointed was Stanley Beck, the former Chair of the Ontario Securities Commission, and a former Dean of Osgoode Hall Law School.

In his December 1995 report, the Special Advisor concluded that the Law Society could administer the certificate program under the funding terms of the MOU. He recommended the appointment of an Independent Monitor who would design a reporting system to provide the required degree of assurance that variations from expected operating results, volumes, and costs would be identified and reported at the earliest possible date, and recommended that the province supply a \$35-million advance from future years' allocations under the MOU to fund timely payment of accounts. During this period, it became apparent that the Plan lacked many of the management tools appropriate for a fixed budget. The Plan's information-technology and financial procedures were seriously outmoded.

In the meantime, in November 1995, the Legal Aid Committee of the Law Society reported to Convocation that the recent service cuts to the Plan were insufficient to control the escalating costs and to stay within the budget set out in the MOU. A major restructuring of the Plan was needed.

Convocation debated whether or not the Law Society should continue to administer the Plan and meet the government's expenditure targets through additional cuts to the certificate program, or whether it should terminate its involvement in the administration of the legal aid program. Following an intense debate at its November 24, 1995, meeting, it was decided by a narrow majority vote that legal aid should remain with the Law Society but

²⁸

Summary of Cost Savings Measures Approved in August, Legal Aid Bulletin August 1995 at 3; *Phase II of Cost-Savings Measures*, Legal Aid Bulletin, October 1995 at 2.

that the following additional cost-containment measures would be put into place on April 1, 1996, including:²⁹

- reduction in the number of certificates from 154,000 as projected in the MOU;
- elimination of all block-fee billing in criminal matters;
- establishment of maximum billing caps on certificates;
- stricter client financial-eligibility requirements for clients.

Table 2.4 sets out the number of certificates issued since 1992 and highlights the dramatic decline in the issuance of certificates over the last several years.

Table 2.4

Certificates Issued by Ontario Legal Aid Plan ³⁰					
Certificates Issued	1992	1993	1994	1995	1996
Criminal	113,524	115,579	107,431	91,235	73,464
Family	53,794	61,704	65,687	60,779	38,186
Immigration/Refugee	33,442	30,914	16,627	11,265	8,337

The impact of the 1996 reductions on all of the participants in the justice system (e.g., clients, lawyers, judiciary, community legal clinic workers, court administrators, police, Crown Attorneys, and correctional workers) has not been fully calculated. However, anecdotal and some statistical evidence collected by both the Plan and this Review warrants the conclusion that the impact of the recent constraints has greatly exacerbated the level of unmet needs of low-income residents of Ontario and has created significant inefficiencies in the justice system as a whole.

3. POSSIBLE EXPLANATIONS FOR THE INCREASING LEGAL AID EXPENDITURES IN ONTARIO IN THE EARLY 1990s

The previous section documented the rise in the need for, and consequent cost of, the provision of legal aid certificates in Ontario, and the Law Society's response to it over the last few years. This section attempts to provide explanations for the increase in costs. The primary economic and social factors that contributed to the imposition of a cap on the legal aid certificate program's funding are reviewed below.

(a) INCREASE IN CLIENT ELIGIBILITY/DEMAND

(i) Rise in Eligibility/Demand for Social Programs and Increased Unemployment

Between fiscal years 1990/91 and 1995/96, the number of social assistance recipients in Ontario increased by approximately 117 percent.³¹ Because the Plan's financial-eligibility

²⁹ *Message from the Treasurer*, Legal Aid Bulletin, February 1996 at 1 - 3; Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report 1996* (Toronto: The Law Society of Upper Canada, February 3, 1997) at 14 - 16.

³⁰ *Ibid.*, at 8.

³¹ Data supplied by Ministry of Community and Social Services, Income Maintenance Branch Data Base.

criteria include those on social assistance, the potential “pool” of legal aid applicants increased dramatically. This increase is a critical factor in understanding the increase in client eligibility, and thus case-load, for the legal aid system in the early 1990s.

Table 2.5 sets out the rise in social assistance recipients and compares it with the growth in legal aid applications. These figures highlight the relationship between the increase in demand for legal aid and the increase in potential legal aid clients that resulted from the economic recession the province faced at that time.

Table 2.5

GROWTH IN SOCIAL ASSISTANCE CASES AND LEGAL AID APPLICATIONS³²						
1989/90 to 1994/95						
	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
# of Legal Aid Applications (000s)	164.5	198.9	250.4	257.3	241.9	220.4
% Change	-	+ 21	+ 28	+ 3	- 6	- 9
# of Social Assistance Cases (000s)	313.6	394.9	530.6	637.3	674.6	681.2
% Change	-	+ 26	+ 34	+ 20	+ 6	+ 1

Tables 2.6 and 2.7 outline the growth in the percentage of unemployment and the increase in the number of beneficiaries of Unemployment Insurance in Ontario during the same period that saw a dramatic increase in legal aid demand.

Table 2.6

Growth in Labour Force Unemployment Statistics in Ontario: Annual Average,³³ 1988-1994	
Annual Average	% of Labour Force
1988	5.0
1989	5.1
1990	6.3
1991	9.6
1992	10.9
1993	10.6
1994	9.6

³² Data supplied by Law Society of Upper Canada, Ontario Legal Aid Plan Annual Reports, and Ministry of Community and Social Services, Income Maintenance Branch Data Base.

³³ Information supplied by provincial Ministry of Finance.

Table 2.7

Growth in Unemployment Insurance Beneficiaries in Ontario, 1989-1994 ³⁴		
Calendar Year	Actual Number of Beneficiaries	% Increase/Decrease
1989	213,870	-
1990	279,660	+30.8
1991	390,920	+39.8
1992	400,120	+2.4
1993	364,550	-8.9
1994	299,490	-17.8
Percentage Increase: 40% from 1989 to 1994		

(ii) Increase in Violent Offence Charges

During the 1989/90-to-1994/95 period, the number of total *Criminal Code* charges laid in Ontario increased by approximately 10 percent and the number of violent offence charges increased by 18 percent.³⁵ The *Legal Aid Act* and the cost-sharing agreement between the federal and provincial governments required the Plan to provide legal aid certificates for all criminal charges where the accused person's liberty or livelihood was at stake in the prosecution. The combination of the increase in the number of charges laid for violent offences and the governing regulatory framework with respect to criminal legal aid resulted in the Plan having little discretion over which (and how many) criminal cases would be funded.

Table 2.8 documents the increase in charges laid relating to violent offences in the early 1990s.

Table 2.8

Violent Offence Charges in Ontario ³⁶ 1989-1994						
	1989	1990	1991	1992	1993	1994
Criminal Code Offences	847,322	910,033	1,011,233	986,296	964,838	932,387
Violent Offences	92,069	99,696	108,721	110,453	112,407	108,574

Percent Increase: Violent offence charges increased by 18 percent and overall *Criminal Code* charges increased by 10 percent between 1989 and 1994.

(iii) Increase in Family Law Cases

During the early 1990s, an increase in family law and child welfare cases occurred, particularly in the Provincial Division of the Ontario Court of Justice.

³⁴*Ibid.*³⁵

Information supplied by the Ministry of the Attorney General.

³⁶*Ibid.*

Tables 2.9 and 2.10 illustrate the growth in family law cases (Provincial and General Division) and the increase in family law legal aid certificates that were completed during that time.

Table 2.9

Family Law Cases in the Ontario Court of Justice, 1990/91 to 1994/95 ³⁷					
Provincial Division	1990/91	1991/92	1992/93	1993/94	1994/95
	42,597	66,666	67,603	69,697	79,299
Percent Increase: 90 percent increase from 1991/92 to 1994/95					
General Division	32,333	41,885	43,252	41,257	39,527
Percent Increase: 22 percent from 1990/91 to 1994/95					

Table 2.10

Completed Family Law Legal Aid Certificates in Ontario, 1989/90 to 1994/95 ³⁸						
	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Total Number of Completed Family Law Certificate Cases	27,830	29,271	33,013	43,462	40,620	53,103
Percent increase: 91 percent from 1989/90 to 1994/95						

(b) CHANGES TO LAWS AND POLICIES

The increase in legal aid costs during the early 1990s occurred against the backdrop of changing provincial and federal laws, to which the legal aid system was required to respond.

(i) Changes to Immigration and Refugee Law

One example of a governmental policy change that had a significant impact on the Ontario legal aid system was the federal amendments to the *Immigration Act*³⁹ in the late 1980s. These amendments changed the refugee determination process, and the federal-provincial-territorial funding arrangement in relation to refugee legal aid cost-sharing. Prior to the 1989 amendments, the federal government funded 100 percent of legal costs attributed to the first stage of the refugee determination process (the “credible basis” determination). Effective in 1993/94, this step of the process was discontinued and, with it, the funding for its legal costs, leaving all of the preparation costs to the new one stage procedure for which the province had to pay all the costs. During this stage, costly preparation for the credible basis hearing was carried out.

Table 2.11 sets out the financial implications for the province of the subsequent withdrawal of federal funding in this area.

³⁷ Ministry of the Attorney General of Ontario, Court Statistics Annual Reports. The major increase in 1991/92 was due to inclusion of “Motions”.

³⁸ Law Society of Upper Canada, Ontario Legal Aid Plan Annual Reports.

³⁹ *Immigration Act*, R.S.C. 1985, c. I-2.

Table 2.11

Certificates Completed and Annual Costs and Funding for Immigration/Refugee in Ontario, 1988/89 to 1994/95 ⁴⁰				
	Number of Completed Immigration/Refugee Certificates	Estimated Total Refugee Costs Millions	Federal Funds (Designated Counsel Program) Millions	Net Ontario Costs Millions
1988/89 (pre-changes)	1,450	1.2	0	1..2
1989/90 (post-changes)	8,583	7.4	1.6	5.8
1990/91	15,247	14.2	5.4	8.8
1991/92	21,245	21.3	9.9	11.4
1992/93	25,921	30.3	7.0	23.3
1993/94	11,886	19.0	4.2	14.8
1994/95	11,523	23.4	0.1	23.3

(ii) Changes to Criminal Law and Policies

The number of legal aid certificates billed for in the early 1990s also increased as a result of specific court decisions and the implementation by government of new justice-related initiatives. For example, in 1991/92 the Plan was obliged to pay the costs of a large number of extra accounts resulting from a surge of cases disposed of pursuant to the *Askov*⁴¹ decision. Other changes included the expansion of the Crown's duty to disclose evidence to an accused (resulting in the need for additional preparation time for defence counsel), court rulings effectively requiring the provision of 24 hour duty counsel, new standards for admissible evidence in sexual assault cases, increased prosecutions of sexual and domestic assault and impaired driving, zero tolerance for school disputes, increased street-level drug enforcement, and procedural and substantive amendments to the *Criminal Code* relating to persons found unfit to stand trial.

(c) INCREASE IN COST PER CASE

The increase in the average cost per case also contributed to the significant growth in legal aid expenditures. While it is difficult to be certain about the reasons for increased case costs, a number of factors likely contributed to the increase in the average cost per case, such as: the increase in cases involving multiple defendants, more frequent pre-trial hearings, more frequent and complex bail hearings in spousal assault cases, increases in the factual and legal length of cases owing to the more frequent use of written submissions by the Immigration and Refugee Board, the increase in legal aid lawyers' work in family law matters as a result of the decrease in the Official Guardian's services, and greater numbers of cases involving historical and complicated allegations of sexual abuse. These factors led to growth in the number of out-of-court hours (preparation time), resulting in a higher number of billable hours charged (within the maximum allowable under the tariff).

⁴⁰ Data compiled from OLAP Annual Reports.

⁴¹ *R. v. Askov* [1990], 2 S.C.R. 1199.

The average cost per completed case increased by 12 percent in criminal matters (from \$1,108 in 1989/90 to \$1,240 in 1994/95), and by 58 percent in civil matters (from \$990 in 1989/90 to \$1,565 in 1994/95). More specifically, in immigration and refugee matters, the average cost per case increased by 162 percent (from \$861 in 1989/90 to \$2,258 in 1994/95). Immigration and refugee cases (11,523 in 1994/95) represented 15 percent of the total civil completed cases (75,740 in 1994/95). The increase in average cost per case in this area alone explains 24 percent of the total 58 percent cost increase in the civil average cost per case. In *Family Law Act* (FLA) and *Children's Law Reform Act* (CLRA) matters, the average cost per case increased by 41 percent (from \$1,067 in 1989/90 to \$1,503 in 1994/95). FLA/CLRA cases (31,112 in 1994/95) represented 41 percent of the total civil completed cases (75,740 in 1994/95). Accordingly, the impact of the growth in case cost in this area in relation to the overall increase in civil case costs was 16 percent. Read together, the combined immigration/refugee and *FLA/CLRA* average cost increases explain 40 percent of the total increase of 58 percent in civil case costs.⁴²

Table 2.12 demonstrates the steady growth in the cost per legal aid case in Ontario through the 1990s.

Table 2.12

Growth in Average Cost per Case in Ontario, 1989/90-1994/95 ⁴³						
Average cost per completed certificate case (\$)	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Total	1,052	1,051	1,085	1,137	1,254	1,382
Criminal	1,108	1,071	1,093	1,111	1,146	1,240
Civil	990	1,042	1,090	1,189	1,422	1,565

In addition, the provincial government raised filing fees and other court costs, which were in turn reflected in the increased disbursement costs faced by the Plan. Other disbursement costs, such as the increased use of medical and other expert witness reports in both criminal and civil cases, also drove up the average cost of certificates.

Table 2.13 outlines the increase in disbursement costs for the Plan over the relevant fiscal years.

Table 2.13

Legal Aid Disbursements Costs (\$ million) in Ontario, 1989/90 to 1994/95 ⁴⁴						
Disbursements	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Certificate Disbursements	\$ 12.7	\$ 17.1	\$ 23.2	\$32.6	\$26.3	\$31.4
Percent Increase: 147 percent increase from 1989/90 to 1994/95						
Duty Counsel Disbursements	\$ 0.42	\$ 0.47	\$ 0.57	\$ 0.78	\$ 0.86	\$1.15
Percent Increase: 174 percent increase from 1989/90 to 1994/95						

⁴² Law Society of Upper Canada, Ontario Legal Aid Plan Annual Reports, 1984/90 to 1994/95.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

Table 2.14 demonstrates the increase in the average cost per completed certificate case and duty counsel assistance between 1989/90 and 1994/95.

Table 2.14

Legal Aid Disbursement Cost Per Completed Case in Ontario, 1989/90 to 1994/95 ⁴⁵						
Average Disbursement per Completed Certificate Case (\$)	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
	\$118	\$131	\$145	\$177	\$177	189
Percent Increase: 60 percent increase from 1989/90 to 1994/95						
Average Duty Counsel Disbursement per Person Assisted (\$)	\$1.32	\$1.38	\$1.44	\$1.86	\$2.17	\$2.52
Percent Increase: 91 percent increase from 1989/90 to 1994/95						

(d) DECREASE IN FEDERAL CONTRIBUTION AND OTHER SOURCES OF REVENUE

Funding for the legal aid system between 1989/90 and 1994/95 came from several sources, as shown in table 2.15 below.

Table 2.15

Ontario Legal Aid System (Plan and Clinics) Sources of Funding, 1989/90 to 1994/95 ⁴⁶						
Sources of Funding (\$ million)	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Province of Ontario (net)	69.7	92.3	164.2	205.1	203.8	194.7
Federal Contributions	57.7	62.3	62.6	66.6	64.7	63.6
Law Foundation of Ontario	35.7	33.5	17.5	18.8	5.6	12.4
Law Society of Upper Canada	4.1	4.7	5.7	6.1	6.0	6.0
Contributions from Clients	8.6	8.8	11.5	13.9	16.3	15.4
Judgments, Costs, Settlements	1.9	2.0	2.4	2.2	2.4	3.9
Miscellaneous Income	2.6	3.4	1.7	1.9	0.9	0.9
Total	180.3	207.0	270.5	314.6	299.7	297.0

(i) Decline in Federal Contributions

Federal contributions were based on cost-sharing agreements for civil and criminal legal aid. Under the Canada Assistance Plan (CAP), expenditures for civil matters were shared where clients met the required needs test. However, the federal government's contribution to civil legal aid, which had represented about one-third of the total cost, was capped to an annual maximum increase of 5 percent per year beginning in 1989/90, just as the recession began to have a major impact on need and case-load.

The cost-sharing agreement in place at that time provided for federal contributions in most criminal matters. Up to 1989/90, the federal funds for criminal certificates were

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* Note that the table incorporates change in basis of accounting, as detailed in the Plan's 1994/95 Annual Report.

determined by a complex formula which guaranteed a minimum federal share of 45 percent and a maximum share of 55 percent. For 1990/91 and 1991/92, the federal contribution was frozen at the 1989/90 level until a new agreement was negotiated. For 1992/93 and 1993/94, the federal contribution was allowed to increase by only 1 percent per year, regardless of actual growth.⁴⁷

The federal government also contributed funds towards the Nishnawbe-Aski Legal Services Corporation (NALSC), an innovative legal-services delivery organization which was formally incorporated on March 1, 1990. With a head office in Thunder Bay, the corporation provides legal services to 48 fly-in and road-access Nishnawbe-Aski communities in northwestern Ontario. During 1994/95, the federal government announced the termination of its funding. The province was left to replace the federal contribution.

As discussed previously, the federal contribution with respect to refugee matters also ceased at this time.

In an open-ended system, the province remains responsible for cost increases if other revenue sources decrease or fail to keep pace with the growth in costs. As demand for legal aid increased in the recession, and the revenues from other sources declined, or did not increase correspondingly, the provincial government's net contribution to the Plan increased by 180 percent between 1989/90 and 1994/95. During the same period, the total federal contribution increased only by 10 percent as a result of the cap on the cost-sharing agreements, and the withdrawal of funding for refugee matters and the NALSC program, as described in the table below.⁴⁸

Table 2.16 below summarizes federal and provincial contributions to the Plan from 1989/90 to 1994/95.

⁴⁷ Note that for 1994/95 and 1995/96, the federal contribution remained at the 1993/94 level; a new agreement was signed in 1996/97, when it was further decreased.

⁴⁸ Working statistics from the Ministry of the Attorney General of Ontario, Finance Branch (1994-95); unpublished. Please note the following:

- * includes newly negotiated federal funds of \$2.2 million for eligible expenditures for community legal clinics, under the Canada Assistance Plan.
- ** federal funding of 0.3 million for 1991/92 was received by Plan in 1992/93 and reported accordingly.
- *** this number is artificially reduced as the government carried expenses forward through loans etc. with the result that the provincial contribution for that year was lower than it would have been had it paid on the same bases as the earlier year.

Table 2.16

Federal and Provincial Funding to the Ontario Legal Aid Plan, 1989/90 to 1994/95 ⁴⁹						
Federal Funding (\$ million)	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Certificates						
- criminal	40.6	40.6	40.6	41.0	41.0	41.4
- civil	15.5	16.3	17.1	18.0	18.9	22.0*
Sub-Total	56.1	56.9	57.7	59.0	60.3	63.4
Designated Counsel Program (Refugee)	1.6	5.4	9.9	7.0	4.2	0.1
Northern Legal Services (Nishnawbe-Aski Legal Services)	0	0	0	0.6**	0.2	0.1
Total Federal	57.7	62.3	67.6	66.6	64.7	63.6
Federal Funding as a Percentage of Total Legal Aid Expenditures	33.2%	29.4%	24.9%	20.7%	21.8%	18.8%
Provincial Net Funding After Federal Funds (\$ million)						
Certificates	47.6	65.4	134.7	173.8	172.1	162.2
Clinics	22.1	26.9	29.5	31.3	31.7	32.5
Total Net Provincial	69.7	92.3	164.2	205.1	203.8	194.7
Provincial Funding as a Percentage of Total Legal Aid Expenditures	40.1%	43.5%	60.6%	63.9%	68.8%	57%***

Table 2.17 outlines the reduction in legal aid funding sources.

Table 2.17

Reductions in Funding Contributions (\$ millions) 1989/90 to 1994/95 ⁵⁰						
	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Funding from all sources other than Province of Ontario	110.6	114.7	106.3	109.5	95.9	102.3
Increases (Decreases) of Funding other than Province	-	+4.1	(8.4)	+3.2	(13.6)	+6.4

(ii) Decline in Revenue from Lawyers' Mixed Trust Accounts

The drop in interest rates, and in commercial and economic activity generally, in the early 1990s resulted in a reduction in the revenues generated from the interest on money held in lawyers' mixed trust accounts. The Law Foundation of Ontario's (LFO) contribution to legal aid, which is based on accumulated interest from mixed trust accounts, declined dramatically. Table 2.18 sets out the decrease in revenue generated by lawyers' mixed trust accounts during the recession of the early 1990s which translated into extra costs for the province.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

Table 2.18

Law Foundation Contribution to the Legal Aid Plan, 1989/90 to 1994/95 ⁵¹						
Source of Funding (\$ million)	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Law Foundation of Ontario	35.7	33.5	17.5	18.8	5.6	12.4

Percent Decrease: 84 percent from 1989/90 to 1993/94 (pre-new agreement)

(e) INCREASE IN NUMBER OF LAWYERS PARTICIPATING IN THE PROGRAM

Some commentators suggest that the growth in demand for legal aid services may have been, at least in part, attributable to the increase of lawyers participating in the legal aid program (supplier-induced demand). This theory contends that the fluctuations in both the number of cases and the cost per case are affected by competitive pressures within the legal profession as well as by external change.⁵² Stated another way, the theory is that during recessionary times lawyers are more likely to take on legal aid cases or bill more hours per case because there is a lack of other work available to sustain their desired level of income.

In the Ontario context, the evidence does not decisively support the theory that the rise in costs to legal aid in the early 1990s is primarily attributable to the lawyers participating in the Plan. Given that criminal lawyers do not control eligibility, and that the bulk of the work in criminal, refugee and, often, family proceedings is driven by the state, and that in family law the number of certificates increased by less than the case-load growth, it is difficult to find evidence to suggest that the lawyers were primarily responsible for driving up legal aid costs.

Table 2.19 tracks the participation of lawyers in the Plan from 1989/90 to 1994/95.

Table 2.19

Lawyer Participation in Legal Aid Plan 1989/90 to 1994/95 ⁵³						
	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
# of practising lawyers in Ontario	14,884	15,435	15,753	16,073	16,532	16,420
# of lawyers doing legal aid	4,937	5,104	5,459	5,962	6,141	6,558
% of lawyers doing legal aid	33%	33%	35%	37%	37%	40%
% of participating lawyers with at least four years experience	85%	85%	85%	83%	82%	83%

⁵¹ Law Society of Upper Canada, Ontario Legal Aid Plan Annual Reports, and Law Society statistics.

⁵² See, generally, T. Goriely, "Revisiting the Debate over Criminal Delivery Models: A view from Britain." In F. Zemans, P. Monahan, and A. Thomas, eds. *A New Legal Aid Plan for Ontario: Background Paper* (North York, Ont.: York University Centre for Public Law and Public Policy, 1997) at 201.

⁵³ Plan Annual Reports and LSUC Statistics.

4. COMPARATIVE ANALYSIS OF RESPONSES TO THE GROWTH IN LEGAL AID IN OTHER JURISDICTIONS

In the early 1990s, the cost of legal aid also grew in several other jurisdictions, including many Canadian provinces, Britain, and Australia. Even though each jurisdiction has its own unique governance structure, funding arrangements, and service priorities, it is useful to identify each jurisdiction's reaction to the growth in legal aid costs. As was the case for Ontario, many of these jurisdictions were forced to undertake significant restructuring in order to meet the fiscal pressures.

(a) BRITISH COLUMBIA

Legal aid in British Columbia is governed by the *Legal Services Society Act*. This act established the Legal Services Society, an independent statutory body responsible for the administration of legal aid in British Columbia.

Between fiscal year 1991 and fiscal year 1996, the cost of legal aid in British Columbia rose from \$42 million to more than \$100 million, an increase of 140 percent.⁵⁴ As a result, the B.C. Legal Services Society (LSS) has undertaken a number of reforms in an effort to control rising costs. For example, in 1994 the LSS launched an ambitious reform plan to transfer approximately 50 percent of the work in the areas of criminal and family law from private practitioners to staff lawyers. In total, the LSS projected that approximately 108 staff lawyers should be hired. This plan provoked considerable opposition from the private bar, including a complete withdrawal of services by the Association of Legal Aid Lawyers. As a result of this conflict, the LSS agreed to hire no more than 90 staff lawyers. Subsequent budget pressures meant that even this revised target was not met.

Other measures adopted by the LSS included tariff management and case management. The LSS has reduced fees paid on tariffs by approximately 35 percent since 1991. It also imposed holdbacks ranging from 5 to 12 percent in 1994.⁵⁵ The LSS has introduced case management and alternative dispute resolution, particularly in the area of family law. Finally, the Legal Services Society has also introduced a client-contribution policy which requires applicants who have earnings that exceed basic income assistance to contribute between \$30 and \$150.

(b) ALBERTA

Alberta does not have legal aid legislation *per se*. Services are provided on the basis of an agreement between the provincial Attorney General and the Law Society of Alberta.

In fiscal year 1996/97, the budget for legal aid in Alberta was approximately \$24 million, a decline of 20 percent over three previous years. In 1993, a pilot project involving the employment of staff lawyers to deliver services to young offenders was commenced in Edmonton and Calgary.

⁵⁴ Office of the Auditor General of British Columbia, *Legal Funding Society Management Review* (Victoria: Office of the Auditor General, 1996).

⁵⁵ N. Henderson, "Law Concerning Legal Aid and Some B.C. Experiences", in F. Zemans, P. Monahan and A. Thomas, eds., *supra*, note 52, at 91-99.

(c) MANITOBA

Legal aid in Manitoba is governed by the terms of the *Legal Aid Services Society of Manitoba Act*. The act establishes the Legal Aid Services Society of Manitoba as an independent statutory corporation.

In fiscal year 1996/97 legal aid in Manitoba had a budget of approximately \$15 million, approximately the same amount as in fiscal year 1992/93.⁵⁶

The Legal Aid Services Society of Manitoba has attempted to meet its funding pressures through a combination of tariff-management and program-delivery innovations. Tariffs in Manitoba have been formally reduced several times since the late 1980s. Specific measures include the introduction of a block fee and tariff cutbacks. A recent amendment provides that, where a case is not formally concluded, only one-half of the applicable tariff is payable. Service-delivery initiatives include using paralegals in remote areas, block contracting in rural areas and for young offender cases, and a program to significantly expand the traditional responsibilities of duty counsel.

(d) QUEBEC

Legal aid in Quebec is governed by the *Legal Aid Act*. This act establishes the Commission des Services Juridiques, a twelve-member independent commission responsible for administering legal aid in Quebec.

Legal aid funding in Quebec has remained stable for several years. Until recently, the commission's primary response to increasing costs has been to reduce the pool of potential legal aid applicants by declining to update its financial eligibility criteria in accordance with the cost of living.⁵⁷

More recently, the Quebec government introduced significant amendments to the *Legal Aid Act*. The amended law stipulates that the government can decide that some types of legal services will temporarily or permanently be obtained through certain types of service providers based on consideration of "the imperatives of sound management of public legal aid funds." It is anticipated that this statutory provision will allow the government to direct clients to the service providers that it considers to be the most cost-effective.

The amendments also set out a number of complex provisions which restrict eligibility in criminal, civil, and other types of litigation.

(e) ENGLAND AND WALES

Legal aid in England and Wales is governed by the *Legal Aid Act, 1988*. Administration of legal aid services is shared by an independent statutory agency, the Legal Aid Board, and the Lord Chancellor's Department.

The cost of legal aid in England and Wales has been rising dramatically. Between fiscal year 1984/85 and fiscal year 1994/95, the cost of legal aid rose more than 500 percent. As

⁵⁶ Allan Fineblit, "Do More With Less", in *ibid.*, at 69.

⁵⁷ Jacques Frémont and Sylvie Parent, "Patchworking Legal Aid in Quebec in Times of Financial Constraints", in *ibid.*, at 120-23.

As of fiscal year 1996/97, the cost of legal aid in England and Wales was approximately £1.4 billion. On a per capita basis, this is about twice as much as is spent in Ontario.⁵⁸

In order to address these rising expenditures, the previous British government initiated a series of reforms ultimately designed to reduce cost and improve quality. The most significant of these reforms is a proposal to deliver most civil legal services through block contracts. Other measures include replacing open-ended legal aid funding with a capped, predetermined annual budget; allowing new types of service providers, including non-lawyers, advice agencies, and mediators, to deliver legal aid services; the preparation of a “national strategic plan” to prioritize legal aid spending; and the development of a system for “franchising” legal aid suppliers as a means of promoting a higher quality of legal aid work.⁵⁹

⁵⁸ Lord Chancellor's Department, *Striking the Balance: The Future of Legal Aid in England and Wales* (London: HMSO, 1996) at 7 and 74.

⁵⁹ As of the date of this report, it is not clear whether the recently elected British government will follow through on these proposed reforms.

CHAPTER 3

PROFILE OF ONTARIO'S CURRENT LEGAL AID SYSTEM

The history of developments in legal aid in Ontario from 1951 to 1994 was reviewed in chapter 2. This chapter provides a description of the current legal aid system in Ontario, including its governance structure, funding, and service-delivery models.

The statute governing the legal aid system is the *Legal Aid Act* and its accompanying Regulation. The Act specifies that administrative authority to “establish and administer a legal aid plan” rests with the Law Society of Upper Canada.¹ The governance and funding regimes for the Plan’s certificate program and community clinic programs are distinct and are discussed separately in this chapter.

1. GOVERNANCE

This section provides an overview of the governance structure for the certificate and clinic programs.

(a) GOVERNANCE OF THE CERTIFICATE PROGRAM

The Law Society administers the certificate program through its Legal Aid Committee. This committee reports to the Law Society’s board of governors, known as Convocation, on the Plan’s administration and operations. According to the Plan’s 1995 annual report, the Legal Aid Committee is responsible for administering the delivery of legal aid services in Ontario and for “developing policy initiatives consistent with the Plan’s objectives”.²

The *Legal Aid Act* does not specify the size, composition, or mandate of the Legal Aid Committee, rather it gives the Law Society the power to determine these matters. Historically, the membership of the Legal Aid Committee was quite large, including Benchers (lawyers elected as governors of the profession), non-Bencher lawyers, lay members, and a law student. In July 1996, the Law Society amended the composition of the committee, reducing its size to eight members, seven of whom are Benchers. Previously, the committee had 16 members, including five lay members. The rationale for reducing the size of the committee was to allow it to focus its activities more sharply. The Legal Aid Committee has several ongoing and *ad hoc* sub-committees to address specific issues,

¹ R.S.O. 1990, c. L 9, s. 2 [hereinafter *Legal Aid Act*], and R.R.O. 1990, Reg. 710.

² Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report 1995* (Toronto: The Law Society of Upper Canada, February 1, 1996) at 13.

including criminal, family, and immigration tariffs; student legal aid societies; and services to particular communities.

Day-to-day management of the certificate program is the responsibility of the Provincial Director, who is appointed by the Law Society, subject to the approval of the provincial Attorney General. The Provincial Director is the chief executive officer of the Plan, responsible to the Law Society for the proper administration of the Plan. The Provincial Director also serves as Secretary on the Legal Aid Committee.

The *Legal Aid Act* and its Regulation divides the province into 47 districts for the purpose of administering the Plan. The boundaries of these areas generally coincide with the province's county structure. Each Area Office is administered by an Area Director, who is usually recruited from the local bar. Most Area Offices are comparatively small operations, and most Area Directors are employed part-time. Support staff may include an office administrator, and possibly other staff who assist in taking applications and conducting financial-eligibility assessments.

The current Area Office structure originated in the era of the charitable legal aid plan (1951-67). During that period, the Plan relied upon the cooperation of the local county or district law association to deliver its services. The 1965 report of the Joint Committee on Legal Aid concluded that the cooperation of the local bar would continue to be important in the revised Plan and that a local Area Director was the best person to ensure such a commitment. The Joint Committee also reasoned that a local Area Director was the best person to ensure that the Plan was responsive to local needs.

Subject to financial-eligibility guidelines, statutory rules, and head office direction on case coverage (discussed below), decisions regarding the granting of certificates are made by local Area Directors.

The *Legal Aid Act* requires that an Area Committee be established for each area of the province. Area Committees hear appeals on refusals by the Area Director to issue certificates, and applications for certificates in appellate matters.

Finally, the Act requires the Plan to establish several panels of local lawyers who have agreed to provide specified services for the Plan, including panels of lawyers willing to do certificate work, act as duty counsel, and who agree to give general legal advice. Any lawyer called to the bar in Ontario may register on one or more panels.

As noted in chapter 2, the organizational structure of the certificate program has changed little since its inception in 1967.

(b) GOVERNANCE OF THE COMMUNITY CLINIC PROGRAM

The governance regime for the community clinic program is established by the “Clinic Funding Regulation”.³ The governance regime set out in the Clinic Funding Regulation closely follows the model proposed by the Commission on Clinical Funding. The commission recommended that clinics should have autonomy and independence in matters

³ “Clinic Funding Regulation” refers to Part IV of the general *Legal Aid Act* Regulation.

of policy and administration, “subject only to accountability for public funds advanced and for the legal competence of the services rendered”.⁴

Section 5(1) of the Regulation defines “clinic” as “an independent community organization providing legal services or paralegal services or both on a basis other than fee for service”. “Independent community organization” is not defined.

The Clinic Funding Regulation establishes a complex series of checks and balances designed to preserve clinic autonomy while ensuring public accountability for funds. The Regulation does this by dividing the governance of community legal clinics between the Law Society’s Clinic Funding Committee (CFC), the clinic funding staff (CFS) and each individual clinic. As a general matter, the CFC and CFS are responsible for determining and administering the terms and conditions of community clinics funding. Conversely, the board of each clinic is generally responsible for determining each clinic’s specific operational policies (including determination of case priorities, other activities, and financial eligibility) within the framework established by the CFC and CFS.

The Clinic Funding Regulation specifies the size and composition of the Clinic Funding Committee. The CFC is to be composed of three members appointed by the Law Society and two members appointed by the provincial Attorney General. The Regulation specifies that both sets of appointees must include at least one “person who has been associated with a clinic”.⁵

Initial funding decisions are made by the CFS upon their review of each clinic’s annual funding application. Final funding decisions are then made by the CFC. The separation of these two steps is designed to allow the CFC to act impartially when it hears appeals resulting from the CFS’s initial decisions.

The Regulation specifies that the “clinic shall be under the direction of a community board of directors”.⁶ “Community board of directors” is not defined, although the Regulation specifies that a “community” includes “a geographic community [or] persons who have a community of interest and the general public”.⁷

As a matter of CFC policy, each clinic is governed by democratically elected, volunteer board of directors. This policy is set out in the “clinic certificate” agreed to each year by the CFC and the board of each clinic. The clinic certificate contains the terms and conditions of funding, and stipulates the amount of funding being provided. Among other terms contained in the clinic certificate is a requirement that the clinic hold annual meetings, file financial statements, and have a complaints policy.

⁴ Ministry of the Attorney General of Ontario, *Report of the Commission on Clinical Funding* (Toronto: Ministry of the Attorney General, 1978) (Mr. Justice Samuel Grange, Commissioner) [hereinafter “Grange Report”] at 22.

⁵ R.R.O. 1990, Reg. 710, ss. 6(1) and (2).

⁶ *Ibid.*, s. 6(3).

⁷ *Ibid.*, s. 5(1).

The CFC does not specify the size or composition of a clinic's board of directors. Those are to be determined in consultation with each board's community.⁸

Day-to-day management of each clinic is the responsibility of an Executive Director. The executive director, staff lawyers, community legal workers and support staff are employed by the clinic board.

As is true of the governance regime of the certificate program, the organizational structure of the community clinic program has changed little since its inception.

2. FUNDING

This section provides an overview of the various extant funding arrangements that support Ontario's legal aid programs.

(a) STATUTORY FRAMEWORK

The funding arrangements for the certificate program and the community clinic system are structured differently. The certificate program receives funding designated out of the overall legal aid budget arising from a range of sources, while the clinic system receives fixed amounts from the Ontario government on an annual basis.

(i) Funding of the Certificate Program

With respect to the certificate side of the system, the *Legal Aid Act* and its Regulation create a Legal Aid Fund into which all sources of revenue are paid and from which all expenditures are made. The governing scheme requires the Law Society to submit to the government an estimate of the sum required to meet the payments out of the Fund for each fiscal year. Where an insufficient amount was estimated (or where the government budgeted an amount lower than the estimate), the *Legal Aid Act* arguably obligates the government to seek further funds to pay the year end costs that exceeded the amount budgeted. Since the signing of the MOU, the demand-driven, open-ended financing scheme set out in the Act and its Regulation has been replaced by pre-set funding levels for the certificate system.

In fiscal year 1995/96, the certificate program budget was approximately \$231 million, representing approximately 77 percent of the total legal aid budget for that year.⁹

(ii) Funding of Community Legal Clinics

As discussed above, the funding for the community legal clinic program is administered by the Clinic Funding Committee. The budget is set annually and there is no provision within the statutory framework for the clinic system to exceed its budgetary allocation from the provincial government. Clinic funding is not the responsibility of the Plan; rather, the clinic system operates under a completely separate funding formula. Some clinics receive a very small portion of their funding from grants, fund-raising, or donations.

The Clinic Funding Regulation specifically provides that the payment of funds to a clinic is made to support the provision of legal and paralegal services, and services designed

⁸ Clinic Operating Manual [unpublished], c. 2.1.

⁹ Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report 1996* (Toronto: The Law Society of Upper Canada, February 3, 1997) at 30.

solely to promote the legal welfare of a community, on a basis other than fee for service. As discussed above, clinic boards are accountable for the funds they receive and must comply with the terms and conditions of the funding certificate that they sign with the Clinic Funding Committee. Individual clinics provide financial and substantive activity reports to the CFC.

The budget for the clinics has historically represented a small portion of legal aid funding. The clinic budget has been capped since clinics began, and frozen since 1993. In fiscal year 1995/96, the total clinic budget was approximately \$32 million. This figure represents approximately ten percent of the total legal aid budget for that year.¹⁰

(b) EXISTING SOURCES OF REVENUE

(i) Provincial Government

The Ministry of the Attorney General makes monthly payments to the Plan upon receipt of the monthly requisitions from the Law Society. The provincial funding allocation represents the total amount from the provincial and federal governments. The province advances the total government funds to the Plan and recovers the federal share from the federal government under cost-sharing agreements.

Funding for the clinic system flows from the Ministry of the Attorney General to the Plan administration as part of each payment. As noted above, the provincial contribution represents almost 100 percent of the clinic system's funding.

(ii) Federal Government

The federal contribution to Ontario's legal aid system arises out of federal-provincial cost-sharing agreements. There are separate funding arrangements for civil and criminal law matters. As discussed in chapter 2, there has been a dramatic decrease in the level of funding from the federal government to Ontario in recent years in relation to cost-sharing of both criminal and civil matters.

a. Criminal Legal Aid Cost-Sharing

Legal aid funding under the federal-provincial criminal cost sharing agreement applies to adults and young offenders receiving certificate legal representation, duty counsel services, and related administrative/operational support. The cost-sharing agreement is with the federal Department of Justice.

A new federal-provincial, criminal cost-sharing agreement was agreed upon in fiscal year 1996/97 and expires in fiscal year 2000/01. This new arrangement provides that federal funding will be redistributed over the next five years based on a formula that takes into consideration a combination of historical federal funding patterns and provincial population. As its proportionate share of the program review reduction, Ontario will receive a funding decrease from \$41.4 million to \$39.8 million and a further reduction of \$0.4 million based on a new historical/population calculation, tilted toward historical patterns, resulting in a 1996/97 federal contribution of \$39.4 million. Based on annual adjustments to the historical/population formula, Ontario's share will decline in annual stages over the

¹⁰ *Ibid.*

succeeding four years by a total of \$1.5 million, to \$37.9 million in 2000/01. The overall federal contribution (nationally) will be limited to a maximum of 50 percent of the total shareable expenditures of all of the provinces for criminal and young offender legal aid services, but will not be linked to an individual province's spending.¹¹

In addition, the federal and the provincial governments agreed to establish a Permanent Working Group on criminal legal aid. The group will take its direction from and report to the Committee of Federal/Provincial/Territorial Deputy Ministers of Justice. The mandate of the group includes such issues as criminal legal aid coverage, funding, financial-eligibility, program delivery, cross-jurisdictional issues, and comparability of data.

b. Civil Legal Aid Cost-Sharing

"Civil legal aid" refers to certificate and duty counsel civil legal aid services in the areas of family law, refugee and immigration matters, other areas of civil law, and associated administrative/operational support.

Historically, Ontario received cost-sharing for civil legal aid under the Canada Assistance Plan (CAP). Effective in 1996/97, CAP was moved to the Canada Health and Social Transfer (CHST). The total funding base for the CHST incorporates an estimated 9.4 percent reduction in federal funds for 1996/97. Under CAP, federal cost-sharing was approximately \$22 million. Accordingly, Ontario's CHST payment continues to include this amount, arguably less 4.1 percent.¹²

(iii) Law Foundation of Ontario (LFO)

The funds held by lawyers for their clients are kept in either mixed or individual trust accounts. The interest on mixed trust accounts (accounts that are held for clients who do not request a separate account) accrues to the LFO pursuant to the *Law Society Act*. The LFO is required by the Act to contribute 75 percent of the amount collected to legal aid. The balance is used by the LFO to fund legal education and research grants. The LFO itself is controlled by the Law Society by the right to appoint three of the five trustees.

An estimated \$500 million is held in lawyers' mixed trust accounts at any given time. Roughly 90 percent of those accounts are held with the five major banks. Until recently, the rate of return on the mixed trust account funds was very low. However, in 1994, the LFO commenced (and succeeded) in negotiating new and improved terms with three of the major banks, representing 66 percent of the total funds.¹³

Also in 1994, in response to concerns about the falling revenues generated from the mixed trust accounts, the government amended the *Law Society Act* to permit lawyers to make the LFO a joint holder of their mixed trust accounts. This amendment would allow the LFO to pool and invest funds into higher earning, though financially low risk, instruments.

¹¹ Federal/Provincial Governments, December 1996-January 1997, *Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating to the Young Offenders Act*, Appendix D, s. 7(1), at 16.

¹² Percentage estimated from working data of the Ontario Ministry of Finance.

¹³ Data received from the Law Foundation of Ontario Office by the Ministry of the Attorney General of Ontario (1996/97).

The ability of each lawyer to draw on the mixed trust account would be not affected by the legislative provision.

The LFO has not adopted the joint investment option provided under the amended legislation. Rather, it has chosen to continue to negotiate with each financial institution and to review further the pooling option under the *Law Society Act*.

Over the past few years, following the negotiation of improved terms with three of the five major banks, the LFO contributions to the Plan have improved. Table 3.1 sets out the LFO's contributions to the Plan over the last few years.

Table 3.1

LFO's Contributions to the Plan (\$ million) 1993/94 to 1996/97 ¹⁴	
1993/94 (pre-new agreements)	5.6
1994/95 (post-new agreements)	12.4
1995/96	20.0
1996/97 (estimate)	10.3

(c) LAWYERS' CONTRIBUTIONS

The Law Society, pursuant to the *Legal Aid Act* and its Regulation, contributes to the Legal Aid Fund an amount equal to 50 percent of the Plan's assessable administrative expenses for each fiscal year. All fees payable to solicitors for legal aid are reduced by 5 percent. This reduction can be applied to discharge up to half of the total obligation in that fiscal year.

The other 50 percent of the obligation is discharged by raising funds through a self-imposed legal aid levy charged to all Law Society members. The levy has been in place for over ten years. There are three classes of fee-paying members: practising, non-practising, and not gainfully employed, or furthering their education. The amount of the legal aid levy for individual lawyers relates to their membership status, not to whether or not they perform legal aid work, or to their income level.

Table 3.2 sets out the amount collected by the Plan from the legal aid levy from 1991/92 to 1996/97.

¹⁴

Table compiled from data supplied by Ontario Legal Aid Plan Annual Reports and the staff of the Ontario Legal Aid Plan.

**Table 3.2: Funds Collected by the Plan from the Legal Aid Levy
1990/91 to 1996/97¹⁵**

Year	Legal Aid Levy per Lawyer (\$)	Total Contributions by the Legal Profession (\$ million)
1990/91	185	4.7
1991/92	240	5.7
1992/93	292	6.1
1993/94	292	6.0
1994/95	292	6.0
1995/96	266	6.0
1996/97	266	6.0

(d) CLIENTS' CONTRIBUTIONS

The Section 46 of the Regulation under the *Legal Aid Act* states that the financial abilities and needs of applicants shall be determined in accordance with standards established by the Ministry of the Attorney General. The Plan administers a needs-based legal aid financial-eligibility test.

As a part of the legal aid financial-eligibility criteria, every applicant for legal aid is financially assessed against the established standards to determine whether he or she is able to contribute fully or partially towards the cost of legal aid that he or she will receive. An agreement to contribute may provide for payments at a fixed time or times, or for payment on the disposition of real or personal property at any time.

The contributions from legal aid clients have increased steadily over the years, as shown in table 3.3.

**Table 3.3: Financial Contributions to the Plan from Its Clients
1989/90 to 1995/96¹⁶**

Year	Clients' Contributions to the Plan (\$ million)
1989/90	8.6
1990/91	8.8
1991/92	11.5
1992/93	13.9
1993/94	16.3
1994/95	15.4
1995/96	14.0

¹⁵ *Ibid.*

¹⁶ *Ibid.*

(e) JUDGMENTS, COSTS, SETTLEMENTS

All judgments, costs, or settlements in favour of legal aid clients are used to reimburse the Plan. In 1995/96, \$3 million was reimbursed to the Plan.¹⁷

(f) MISCELLANEOUS INCOME

Additional revenue is collected from the sale of research memoranda produced by the Research Facility of the Plan to lawyers not acting in legal aid cases; legal aid application fees (\$25 per application, introduced in October 1995); and interest earned on current accounts.

The miscellaneous income amount has varied through the years. In 1995/96, this income totalled approximately \$0.5 million. The newly implemented application fee generated an additional \$0.6 million in 1996.¹⁸

3. DELIVERY MODELS

The legal aid system in Ontario is often described as utilizing a “mixed” model of service-delivery because it supplies legal services through three major programs: the certificate program, the community clinic program, and the duty counsel program. This section summarizes the basic elements of each program, including their respective coverage and financial-eligibility guidelines, services provided, client base, and service providers. Also discussed, are a number of the Plan’s other programs, including its Research Facility, the Nishnawbe-Aski Legal Services Corporation, and other initiatives.

(a) CERTIFICATE PROGRAM

The Plan’s certificate program delivers its services through a “judicare” model. The Plan tests applicants for eligibility and then issues a “certificate” which may be taken to any member of the private bar willing to accept it. The private lawyer is paid by the Plan on a fee-for-service basis, according to the Plan tariff.

As discussed in chapter 2, between 1985 and 1993 the number of certificates issued by the Plan grew substantially. As a result of the cost-cutting measures imposed by the MOU, however, the number of certificates issued since 1993 has contracted significantly. In fiscal year 1997, the certificate program issued approximately 80,000 certificates, the lowest number in more than twenty-two years.

As noted above, the certificate program is by far the largest component of the legal aid system in Ontario.

(i) Eligibility

An applicant’s eligibility for a certificate is dependent upon two criteria: the Plan’s “coverage” and the applicant’s financial eligibility. “Coverage” refers to the range of cases and/or proceedings in which the Plan offers services. Currently, the certificate program’s coverage is dependent upon both the Act itself and the certificate prioritization measures

¹⁷ Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report 1996* at 30.

¹⁸ *Ibid.*

adopted in April 1996. An applicant's financial eligibility is determined after a complex financial assessment of his or her income, assets, and financial needs. An applicant must meet both the case coverage and financial criteria before a certificate will be issued.

The certificate program's coverage and financial-eligibility rules are discussed briefly below.

a. Coverage

As noted above, the certificate program's coverage depends upon both the wording of the *Legal Aid Act* and the Plan's recent prioritization measures.

Sections 12 to 15 of the *Legal Aid Act* and sections 40 to 47 of its accompanying Regulation set out a range of mandatory and discretionary circumstances in which the Plan will issue a certificate, subject to the applicant's financial eligibility. The range of criminal and civil proceedings potentially eligible for certificates is quite broad. The Act excludes only a small number of proceedings from coverage.

Section 12 of the Act states the legal matters for which legal aid *shall* be given. The section specifies that, except as otherwise provided in the Act or its Regulation, a certificate shall be issued to a person otherwise entitled thereto in respect of any proceeding or proposed proceeding,

- (a) in the Ontario Court (General Division);
- (b) where the applicant is charged with an indictable offence or where an application is made for a sentence of preventive detention under Part XXI of the Criminal Code;
- (c) under the Extradition Act (Canada) or the Fugitive Offenders Act (Canada); and
- (d) in the Federal Court of Canada.

Section 13 of the Act states that legal aid *may be given subject to the discretion of the Area Director*,

- (a) in any summary conviction proceeding under an Act of the Parliament of Canada, if upon conviction there is likelihood of imprisonment or loss of means of earning a livelihood;
- (b) in any proceeding under the Provincial Offences Act, if upon conviction there is likelihood of imprisonment or loss of means of earning a livelihood;
- (c) in any proceeding,
 - (i) in the Ontario Court (Provincial Division) in respect of proceedings under statutory provisions set out in the Schedule to Part III of the Courts of Justice Act,
 - (ii) in the Small Claims Court,
 - (iii) before a quasi-judicial or administrative board or commission otherwise than in an appeal thereto,
 - (iv) in bankruptcy subsequent to a receiving order or an authorized assignment, or
 - (v) for contempt of court; or
- (d) for drawing documents, negotiating settlements or giving legal advice wherever the subject-matter or nature thereof is properly or customarily within the scope of the professional duties of a barrister and solicitor.

Section 14 of the Act lists the legal matters for which legal aid *may be granted with the approval of the Area Legal Aid Committee*, including:

- (a) in an appeal to
 - (i) the Supreme Court of Canada,
 - (ii) to Federal Court of Canada,
 - (iii) to the Court of Appeal for Ontario,
 - (iv) to the Divisional Court,
 - (v) to a judge sitting in court,
 - (vi) under Part XXIV of the Criminal Code (Canada) or the Provincial Offences Act,
 - (vii) to the Assessment Review Board from a municipal assessment of a property that is the residence of the applicant and by way of appeal from the decision of the Assessment Review Board thereon to a judge of the Ontario Court (General Division) and by way of appeal from the decision of such judge to the Ontario Municipal Board, or
 - (viii) to a quasi-judicial or administrative board or commission, or
- (b) in a proceeding by way of mandamus, quo warranto, certiorari, motion to quash, habeas corpus or prohibition; and
- (c) in any matter referred by the Area Director to the Area Committee.

Section 15 of the Act lists the matters for which legal aid *will not be given*, including:

- (a) in proceedings wholly or partly in respect of defamation;
- (b) in relator actions;
- (c) in proceedings for the recovery of penalty where the proceedings may be taken by any person and the penalty in whole or in part may be payable to the person instituting the proceedings; or
- (d) in proceedings relating to any election.

The second component of the certificate program's coverage rules are the complex prioritization rules that the Law Society adopted in April 1996. These rules were adopted in order to give the Plan a basis for rationing the fixed number of certificates it would be able to issue after April 1996. These rules essentially establish a hierarchy of case priorities for each of the Plan's major areas of practice.

As a general principle, the prioritization rules are premised on a belief that certificates should be issued on the basis of the relative "seriousness" of the proceeding to an applicant. Criminal certificates are issued on the basis of the "likelihood of incarceration". In family law, the "governing principle ... is to protect the safety of a spouse or child who is at risk, or to protect an established child/parent bond".¹⁹ It is important to note that the priority

¹⁹

Bencher's Bulletin, February 1996, at 2-3. See also the discussion of case coverage in subsequent chapters of this report discussing specific areas of law.

rules are based on categories of cases, rather than on the circumstances of individual clients.

b. Financial Eligibility

Section 16 of the Act specifies that an applicant's financial position must be considered when determining whether he or she is eligible to receive a legal aid certificate. Depending upon his or her financial status, an applicant may be eligible for a free certificate, or a partial certificate, or ineligible for a certificate.

The Plan utilizes a "needs" test to determine financial eligibility. The Plan assesses the assets, income, and monthly living expenses of an applicant and/or his or her spouse in order to determine if the person meets the financial-eligibility criteria. Where this test identifies disposable income or liquid assets in excess of the allowable amount, the Plan requires a client to contribute towards the cost of the certificate, or will deem the person ineligible.

(b) CASE MIX

"Case mix" refers to the proportion of certificates granted in different kinds of legal proceedings. By the early 1990s, the Plan was issuing certificates for a very broad range of proceedings, including criminal, family, immigration, refugee determination, negligence, and administrative law (see table 3.4).

The Plan's changing "case mix" is likely the result of several different factors, including the changing nature of demand for legal aid services and the imposition of its prioritization rules in 1996.

**Table 3.4: Percentage of Plan Certificates Issued by Area of Practice
(Case Mix), 1990-1997²⁰**

Year	Criminal Certificates (% of Total)	Civil Certificates (% of Total)	Breakdown of Civil Certificates (% of Total)		
			Family Certificates	Immigration Certificates	Other Civil Certificates ²¹
1990/91	59	41	24	10	7
1991/92	54	46	26	8	12
1992/93	51	49	25	10	14
1993/94	50	50	28	14	8
1994/95	51	49	28	8	8
1995/96	51	49	33	6	10
1996/97	66	34	21	8	5

(c) SERVICE PROVIDERS

The Plan collects only summary information about the private lawyers who accept certificates. In fiscal year 1996, 6,786 solicitors billed the Plan, representing almost 40

²⁰ Table compiled from data supplied by Ontario Legal Aid Plan Annual Reports and OLAP staff.

²¹ "Other Civil" includes Workers' Compensation Board actions, property actions, damage/negligence actions.

percent of the province's lawyers. On the whole, most private lawyers participating in the Plan bill the Plan for relatively small amounts. In fiscal year 1996, almost 60 percent of lawyers providing certificate services billed the Plan for less than \$20,000.²²

From the existing data, it appears that most lawyers accepting certificates are quite experienced. In 1996, 45 percent of all fees paid to lawyers went to those who had 12 or more years' experience. An additional 39 percent of fees were paid to lawyers who had between four and 12 years' experience.²³

The Plan does not collect information about the proportion of total fees that lawyers derive from certificate work or the proportion of legal aid lawyers who work in large or small firms. The Plan has only recently begun to collect data about the comparative specialization of those who accept certificates (as opposed to their years of experience). Given the obvious link between quality of service and experience, the composition of the "pool" of service providers has important policy consequences for the certificate program.

(d) COMMUNITY CLINIC PROGRAM

There are currently seventy community legal clinics in Ontario, serving over 100 communities. Within this number, there are two categories of clinics: general clinics and specialty clinics. Most clinics (fifty-six) offer general services in core areas of "poverty law" practice. Specialty clinics offer services in a particular area of law or in the legal needs of a specific client group.

(i) Eligibility Criteria

As is true of the certificate program, clinics have both coverage and financial eligibility criteria. In accordance with the community governance model, clinic boards have the authority to establish both sets of criteria. Board decisions on these matters must, however, conform with the general framework of the Clinic Funding Regulation, CFC policies, and the terms and conditions of each clinic's certificate.

a. Coverage

Section 4(2) of the Clinic Funding Regulation establishes the clinic system's coverage:

[i]n this Part, "funding" refers to the payment of funds to a clinic to enable the clinic to provide legal services or paralegal services, or both, including activities reasonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of a community, on a basis other than fee for service.

General clinics tend to offer individual case-by-case advice or representation in the areas of income maintenance law (including employment insurance, workers' compensation, Canada Pension Plan, *Family Benefit Act*, *General Welfare Act*, and Old Age Security matters) and housing law (primarily *Landlord and Tenant Act* matters). Some general clinics also offer services in employment law (including employment standards and wrongful dismissal matters), and immigration law. Specialty clinics provide services within the area of their specialization.

²² Law Society of Upper Canada, Ontario Legal Aid Plan Annual Report at 11.

²³ *Ibid.*

b. Financial Eligibility

Clinics provide summary advice without testing income. Client representation is provided to those who meet the clinic's financial eligibility guidelines. As noted above, each clinic certificate specifies that each clinic board must adopt a financial-eligibility policy that complies with CFC guidelines. CFC guidelines establish maximum income and asset levels for clients seeking services other than summary advice and information.

(ii) Services Provided

Importantly, the Clinic Funding Regulation defines the potential scope of clinic services broadly. Generally speaking, clinics tend to provide the following services:

- (1) summary advice and legal information within clinic areas of practice;
- (2) referrals to social service and community agencies, lawyers in private practice, and the Plan;
- (3) client representation before courts and administrative tribunals;
- (4) public legal education: clinic seminars, workshops, presentations;
- (5) law development initiatives, including litigation and appearances before municipal councils, legislative committees, and public inquiries; service on government advisory bodies; and
- (6) projects to enhance the efficiency of clinic resources by providing mutual support which can help educate members and assert defences and claims.

The services provided by general clinics are often linked to several central "supports," including the Clinic Resource Office (CRO), specialty clinics and the clinic funding staff (CFS). The CRO was established in 1991 to provide legal and technical support services to clinic practitioners in the main substantive areas of clinic practice. The CRO provides legal research and training for clinic case workers, provides legal resource materials, and assists in information sharing between clinics. Specialty clinics act as resources for all the clinics.

(iii) Service Providers

As noted above, there are currently seventy community legal clinics in Ontario, serving more than 100 communities. General-service clinics are established as a neighbourhood legal office staffed by three categories of employees: lawyers, community legal workers, and support staff.

Despite the large number and wide variety of clinics, the number of staff in the clinic system is comparatively small. As of July 1996, the CFC funded approximately 430 positions throughout the system, representing an average of approximately six positions per clinic. Of this total, the CFC funded 174 lawyer positions, 113 community legal workers,

and 144.5 support staff.²⁴ Approximately one-half of the total number of clinics are funded for between three to five positions.²⁵

Clinics are located across the province, although there are several “gaps” in the clinic system. Fourteen Ontario counties/districts do not at present have a general-service clinic, including counties/districts containing the towns of Parry Sound, Orangeville, Owen Sound, Stratford, Kirkland Lake, Lindsay, and Guelph.

Clinic legal staff are relatively experienced at the bar. Of the lawyers employed in the system, more than 45 percent were called to the bar in 1985 or earlier. 32 percent were called between 1986 and 1990. Only 22 percent have less than five years’ experience. Community legal workers (CLWs) are slightly less experienced: 35 percent of CLWs had ten or more years of employment in the clinic system, 37 percent had between five to ten years, and 27 percent had less than five years’ experience.²⁶

(e) DESCRIPTION OF DUTY COUNSEL OPERATIONS

The Plan provides three types of duty counsel assistance: the Hotline Service (a 24-hour telephone-advice service for persons in custody); staff duty counsel (salaried lawyers located in a few criminal, family, and young offender courts who provide legal advice; conduct bail hearings; and represent clients on guilty pleas, withdrawals or diversion, and other matters); and private bar (*per diem*) duty counsel who provide civil duty counsel services as well as many of the same functions as staff duty counsel. The Plan also operates a series of advice duty counsel clinics established in some neighbourhood settings across the province to offer advice during a few hours each week.

(i) Eligibility Criteria

a. Coverage

In criminal and young offender matters, staff and private duty counsel services are restricted to matters relating to guilty pleas, bail hearings, providing limited legal advice about legal procedures, and non-complicated sentencing matters. Generally speaking, criminal duty counsel do not conduct trials.

In civil matters, staff and private duty counsel services are provided in family courts and in psychiatric units in Ontario hospitals. Services are generally restricted to providing legal advice, arranging adjournments, and obtaining consent orders.

Duty counsel clinics offer summary legal advice about a broad range of legal issues. These clinics are typically open for a few hours each week at scheduled times. They are often located in community centres, educational institutions, and other public buildings, such as libraries. In fiscal year 1994/1995, the Plan operated 33 such clinics. The Plan intends to increase this number to more than 60 duty counsel clinics in the near future.

²⁴ Data compiled from statistics provided by clinic funding staff.

²⁵ Thirty four clinics receive funding for five or fewer staff positions. Statistics provided by clinic funding staff..

²⁶ *Ibid.*

b. Financial Eligibility

Duty counsel services are generally provided to any person who has not retained counsel, regardless of income. In April 1997, the Plan began a pilot project, in six locations across the province, which tests for financial eligibility those who apply for duty counsel assistance.

A June 1997 interim report on duty counsel financial-eligibility testing prepared by the Legal Aid Committee states that the Committee will extend the evaluation of the program, but will now exclude people in custody and young offenders from financial-eligibility testing.²⁷ Although there was a need for some improvements in the data collection, the interim report indicates that fewer than one percent of all people seen by duty counsel in criminal courts at the test sites were ineligible for service. Only seven percent of all those seen by duty counsel for family law matters were ineligible.

Interestingly, the report notes that testing has not resulted in a large increase in the number of people who intend to hire private lawyers. In fact, more than 50 percent of clients who were refused service in family and criminal court intended to represent themselves. At this point in the evaluation, the Legal Aid Committee was unable to determine whether there were actual cost savings resulting from eligibility testing.

(f) OTHER SERVICES OFFERED BY THE PLAN

(i) Student Legal Aid Societies

The Plan directly funds student legal aid societies at each of Ontario's six law schools. Working under the supervision of review counsel and faculty, these societies offer legal assistance and public legal-education programs. During the 1995 fiscal year, the societies opened files and provided summary advice to approximately 11,300 people.²⁸

(ii) Research Facility

The Plan's Research Facility conducts research to support the cases of clients receiving legal aid. The Research Facility program includes producing standard and individualized research memoranda for lawyers acting on certificates, and the sale of standard memoranda of law to private practitioners.

(iii) Nishnawbe-Aski Legal Services Corporation (NALSC)

The NALSC, as an innovative legal services-delivery organization, was established through the collaborative efforts of NALSC, the Ministry of the Attorney General of Ontario, the Plan, and the Department of Justice. It was formally incorporated on March 1, 1990. With a head office in Thunder Bay, the corporation issues certificates for work under the Plan, but also directly offers supervised paralegal services, public legal education, and law reform work to 48 fly-in and road access Nishnawbe-Aski communities in northwestern Ontario. The NALSC is governed by a 12-person board representing the corporation's membership, who are the chiefs of Nishnawbe-Aski communities, and is managed by an

²⁷ Information provided by the Plan staff.

²⁸ *Supra*, note 2, at 26.

executive director who is a lawyer. Other staff include a second lawyer, a public legal education coordinator; eight community legal workers, six of whom are located in various Nishnawbe-Aski communities or tribal council offices; two legal aid clerks; a business manager; and two support staff.²⁹

²⁹

See *Evaluation of the Nishnawbe-Aski Legal Services Corporation: Final Report* (Campbell Research Associates, March 1994) at 1.

THE LEGAL NEEDS OF LOW-INCOME ONTARIANS

As part of its Terms of Reference, this Review was directed to identify the kinds of legal needs commonly experienced by low-income Ontarians. In an attempt to gain as clear an understanding as possible of these needs, the Review took a number of steps. First, we circulated a consultation paper to which more than 170 seventy written responses were received from across the province. Also, Professors William Bogart and Colin Meredith were commissioned to prepare a background paper for the Review entitled "Current Utilization Patterns and Unmet Legal Needs", and many of the other background papers and case-studies similarly addressed the legal needs, met and unmet, of low-income Ontarians in particular contexts.¹

It is a fundamental precept of this Review that allocation decisions regarding the limited resources of legal aid should flow from an in-depth understanding of the legal needs of low-income-Ontarians. While the Review had neither the time nor the capability to conduct extensive empirical research on this issue, several key conclusions can be reached on the basis of the investigations that were undertaken. First, it is clear that the legal needs of people who have low-incomes differ from those of people with means, in part because particular areas of law apply only to the former group, whose severely restricted financial resources create special problems of access to the providers of legal services. Second, factors that contribute to a person's poverty, such as disability, age, or race, create specific legal needs. Third, because of these factors, the allocation of legal aid resources should rest upon the development of mechanisms for assessing, on an ongoing basis, the particular and changing legal needs of low-income Ontarians. Further, these assessments should be based on actual circumstances rather than on assumptions about the kinds of legal issues that may be significant.

This chapter describes some of the legal needs that arise in the lives of low-income residents of Ontario. It also canvasses the array of their legal needs and identifies some of the special needs of groups that can be said to suffer from multiple disadvantages. It concludes that needs extend across a broad range of law and legal services. The chapter discusses how legal needs have been determined in various jurisdictions, and some of the methodologies used for determining them. It also argues that legal aid services and their delivery must be needs-based, and it suggests how this goal might be achieved on an ongoing basis.

¹ For background papers and a summary of the submissions see, respectively, Vols. II and III, and Vol. I, Appendix A, this report.

1. METHODS TO ASSESS LEGAL NEEDS

The legal needs of low-income Ontarians stem from both legal problems in the classic or commonly understood sense and problems that are an outgrowth of their poverty, and thus “particularly their own.”² Some submissions to the Review considered the most pressing legal needs of low-income people to be those flowing from issues fundamental to human health and survival—housing, income maintenance, employment, and access to health care. Other submissions assessed legal needs, not on the basis of the seriousness of the underlying legal problem, but rather on that of the circumstances of the persons who may be experiencing the problem: abused women, Aboriginal people, visible minorities, persons with disabilities, youth, or the elderly. Still other submissions highlighted needs principally in the areas of criminal and family law.

As Bogart and Meredith suggest, three main problems occur in attempts to assess empirically the breadth and scope of legal needs of the economically disadvantaged: first, the concept of “legal needs” can be an elusive one; second, there is a general lack of information about what the legal needs, however defined, of low-income people are, particularly in Ontario; third, since studies treat criminal and civil legal needs separately, the multifaceted or overlapping nature of such needs can be obscured.

2. DETERMINING LEGAL NEEDS: PERSPECTIVES AND STATISTICAL GAPS

Low-income Ontarians require legal aid services that are responsive to their legal needs, yet, as Bogart and Meredith point out, “legal need” can be difficult to conceptualize. First, lawyers may be less attentive to some issues that are of great importance to a person because these issues have traditionally been viewed as having only minimal legal content. Second, these issues can be hard to identify without specialized legal training. Third, as the law itself can change, an issue or a problem that once had no legal dimension may now have one.

In determining what the legal needs of low-income people are, an important consideration is who is in the best position to articulate those needs. *The Report on Systemic Racism in the Criminal Justice System*³ makes it clear that different constituencies within the criminal justice system saw issues, needs, and problems differently. In other words, experience is partial, and the usefulness of research has its limits. When we consider what the legal needs of low-income people might be, we can expect that different constituencies will posit different or differently prioritized needs. As Bogart and Meredith suggest, if the purpose of legal aid is to provide a range of services comparable to those available to fee-paying clients, will that vantage point for defining what constitutes a legal need be too conventional or too individualist to effectively meet the pressing legal needs of low-income people and the different ways in which they live and come into contact with the law?⁴

² Ministry of the Attorney General of Ontario, *Report of the Task Force on Legal Aid*, Mr. Justice John Osler, Chair [(Toronto: Ministry of the Attorney General, 1974), at 39 hereinafter Osler Report].

³ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: December 1995) at 11-36.

⁴ W. Bogart, C. Meredith and D. Chandler, “Current Utilization Patterns and Unmet Legal Needs”, a background paper prepared for the Ontario Legal Aid Review (1997), Vol. II, this report.

Legal and social services providers, judges, administrators, academics, community groups, and consumers of legal aid services have indicated to this Review what they believe the legal needs of low-income people to be. Every group has spoken from their own experience or from their own work. The information has proven insightful and invaluable. Each person has his or her own view of what poverty is about and what legal needs flow from it. When these views are consolidated, a picture of the legal needs of low-income people emerges.

That is not to say, however, that there exists a wealth of reliable statistical information about the legal needs of low-income people or about which delivery models provide the best and most cost-effective service. As the Canadian Bar Association urges in their submission to the Review,⁵ efforts must be made to collect the data necessary to make considered decisions about the financial resources required to fund legal aid adequately, and this must be done on a continuing basis.

We need better information about the kinds of legal problems that people have, and better information on the qualitative effects on clients who proceed in legal matters without representation. We need more detailed statistics on the experience and specialization of the lawyers who participate in the Plan's certificate program, more detailed information on the costs of the various stages of legal proceedings, more detailed reporting of applications and new certificates, and more information about the quantifiable effects of the funding decisions that have limited coverage to date. As set out in *From Crisis to Reform: A New Legal Aid Plan for Ontario*,⁶ the "tracking" of applicants denied legal aid, and more detailed information about the individuals helped by duty counsel, would also be of assistance in determining legal needs and evaluating them.

3. NEEDS FOR DIFFERENT TYPES OF SERVICES

As indicated above, the Review considers it a matter of first principle that the legal aid system be designed around needs rather than delivery models. That is, the starting-point for designing the service-delivery system ought to be an assessment of needs rather than an assessment of the capacity of a particular delivery system. One of the difficulties in assessing needs is divorcing such evaluations from preconceived notions of the nature of available services.

Not all legal needs involve advocacy or representational services. For example, the demand that low-income people have for legal information is profound. As the National Council of Welfare expresses it, "part of the problem is that low-income persons, who have the least formal education, who often lead isolated lives, and who have usually suffered many injustices, are so badly informed they do not know or believe they have any rights".⁷

Many submissions to the Review have argued that the legal needs of low-income people can be met in a variety of ways, not all requiring representation: a phone call, a letter, some

⁵ Canadian Bar Association—Ontario, submission to the Ontario Legal Aid Review (April 15, 1997).

⁶ Frederick H. Zemans and Patrick J. Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario*, (North York, Ont.: Osgoode Hall Law School, York University Centre for Public Law and Public Policy, 1997)

⁷ National Council of Welfare, *Legal Aid and the Poor* (Ottawa: National Council of Welfare, 1995) at 15.

summary advice, assistance filling out a form or a court document, a referral to a non-legal service provider, support in bringing a group together to solve a common legal problem, law-reform initiatives to help inform lawmakers about the effects that legislation or proposed legislation has or will have on low-income people, assistance with participating in a hearing or through complicated and protracted litigation. As several practitioners argued in their submissions, many of the pressing problems faced by their more disadvantaged and more marginalized clients can be settled with a couple of hours' work. In thinking about legal needs, then, it is important to keep in mind that they vary in intensity in terms of what service response may be appropriate.

4. THE AVAILABLE DATA ON NEEDS

Bogart and Meredith conclude that there is little knowledge of legal needs and, in particular, unmet legal needs. Indeed, the very definition of what constitutes a legal need is contentious, as the measures for determining it vary: the social-indicator approach uses factors such as unemployment, geographic isolation, gender, ethnicity, or receipt of social assistance to assess articulated goals of legal-service delivery programs; the qualitative approach endeavours to understand a particular group's encounters with the law and legal institutions; the quantitative approach samples general populations.

Nevertheless, several studies have attempted to survey the legal needs of low-income people in the context of civil law. The Ontario Civil Justice Study, for example, undertaken in 1987-88, surveyed three thousand households.⁸ Approximately one-third of the respondents reported one or more serious legal problems. The most frequently reported involved personal injury, consumer, debt, and discrimination issues. In 1989, the Maine Commission on Legal Needs was established to oversee a study of the civil legal needs of Maine's poor.⁹ The four categories of needs most frequently cited by those surveyed were income-maintenance, health, family, and utility problems; about 65 per cent of all legal problems reported involved basic necessities.

The most recent American Bar Association (ABA) Legal Needs Study¹⁰ was conducted in 1993 and focused on low-income and moderate-income homes. Overall, approximately half of the households surveyed reported facing a situation that raised a legal issue within a twelve-month period. Legal needs most likely to be taken to the civil justice system arose from family and domestic issues; legal needs least likely to be taken to the civil justice system involved issues relating to community services, health, employment, housing, property, personal finances, and consumer matters. Older persons and the "profoundly poor" in the ABA study reported substantially fewer legal needs, and low-income-people expressed concern about the cost of legal services as a deterrent to pursuing legal remedies.

⁸ W.A. Bogart and N. Vidmar, "Problems and Experiences with the Ontario Civil Justice System: An Empirical Assessment," in A. Hutchinson, *Access to Civil Justice* (Toronto: Carswell, 1990).

⁹ Wendy F. Rau, "The Unmet Legal Needs of the Poor in Maine: Is Mandatory Pro Bono the Answer?" (1991), 43 Maine L. Rev. 235.

¹⁰ See Bogart, *et al.*, *supra*, note 4, Vol. II, this report.

5. GATHERING DATA ON LEGAL NEEDS

Bogart and Meredith argue that any empirical measurement of legal needs is expensive and limited in its usefulness. Legal needs are never static, and neither is the law. Legal needs can differ across regions and communities, as many of the submissions to the Review have emphasized. Further, in general samplings, the reporting of legal needs is subjective, and caution needs to be taken in quantifying the results. How, then, do we gather data on the legal needs of low-income people in order to build a legal aid system that is responsive to need?

Many of the submissions to the Review have suggested that service providers, clients, and community groups should have some formal way of providing input to Plan administrators on an ongoing basis about what types of legal coverage are important relative to a particular area of law, or with respect to a particular community or region. Plan administrators themselves are an important source of information with respect to client needs and the way in which needs change over time.

Further, Bogart and Meredith argue that legal clinics are well situated for this task and should be used in a more formal and systematic way for this purpose: clinics are located in many parts of the province; some represent special constituencies such as the disabled, the elderly, or the Aboriginal community; all come from a tradition of community-board structure and community development; clinics are well versed in the issues of "poverty law" and are attentive to legal and legislative changes that have an impact on it. Bogart and Meredith also surveyed Area Directors and duty counsel with respect to a variety of issues, including the need for services. In sum, legal clinics, Plan administrators, and duty counsel should be utilized more effectively as sources of data on the changing legal needs of the poor.

6. THE LEGAL NEEDS OF LOW-INCOME ONTARIANS

As the National Council of Welfare has reported, poverty statistics for 1995 turned out to be "shockingly high"; based on their 1995 analysis, the Council estimates that, in 1997, 15.3 per cent of the total population of Ontario, or 1,698,000 people, live in poverty.¹¹ One of the most significant contributors to this situation has been the downsizing economy, with high levels of unemployment and fewer full-time jobs. As Statistics Canada has found, new jobs are being polarized in terms of short-term and long-term opportunities: that is, as we experience increases in the numbers of people looking for secure employment, more people are out of work for longer periods of time. Further, incomes for families and unattached individuals have been stagnant since 1980.¹²

Poverty, then, is an issue for growing numbers of Ontarians who may need to rely on income-maintenance schemes because of such factors as old age, disability, or injury, or who face longer periods of unemployment as they move in and out of the workforce. What, then, are the legal needs of people who have low-incomes?

When many people consider why they might need access to lawyers and legal services, they think about a divorce, the sale of their house, or what transpired after their teenager was

¹¹ National Council of Welfare, *Poverty Profile 1995* (Ottawa: Ministry of Supply and Services, Spring 1997) at 20.

¹² Statistics Canada, *Perspectives on Labour and Income* (Ottawa: Ministry of Supply and Services, Winter 1996).

arrested for shoplifting. These are commonly understood to be the textbook models of personal legal problems that Stephen Wexler sets out in his leading article on “poverty law,” “Practicing Law for Poor People”:¹³ they occur when a settled and harmonious pattern of life is interrupted by a car accident, job loss, marriage breakdown, or death in the family.

Certainly low-income people have problems requiring legal assistance that are “common to all humanity”,¹⁴ such as accidents, custody disputes, and children who come into conflict with the law, but what results from the widespread legal regulation of the poor is that the “poor do not lead lives into which the law seldom intrudes”.¹⁵ In their submission to the Review, Parkdale Community Legal Services¹⁶ has argued that low-income people do not have the luxury of occasional or discrete encounters with the legal system because most of the legal problems they face are problems of everyday life. As the National Council of Welfare has pointed out, the poor depend upon the law itself for the necessities of life.¹⁷

What does the National Council of Welfare mean by this? Unlike middle-class people, persons with low-incomes are subject to complex laws and obscure legal regulations when they seek the means to survive. As Janet Mosher and Ian Morrison state in their research paper for the Ontario Civil Justice Review, “the sites where disputes with potentially ‘legal’ aspects are most likely to arise are in relation to the welfare state, to landlords, to people and institutions which control access to the basic necessities of food, shelter, and so on”.¹⁸ The practice of law for low-income people, then, is often about helping them understand and cope with law, regulation, or policy in order to obtain something promised to them by law or to preserve their access to it.

Unlike that of people of means, low-income people’s relationship to government administrators and law will determine such things as their income, their housing, their health care, or their conditions of employment. In other words, the legal needs of low-income people extend across a wide range of areas because, while sharing many legal problems encountered by their more affluent counterparts, they also have, as pointed out in the submission to the Review by the Clinic Funding Committee, “lives significantly different from that of the traditional consumer of legal services.”¹⁹

Aside from the various areas of law that have an impact on the lives of low-income people, the legal system, itself, is complicated and intimidating. Many submissions to the Review identified the problems that procedural complexities cause all clients, and especially clients who are marginalized by such factors as illiteracy, disability, or youth. A proceeding under the *Landlord and Tenant Act* will use arcane language and sophisticated legal concepts

¹³ Stephen Wexler, *Practicing Law for Poor People*, 79 Yale L.J. (1970) at 1005.

¹⁴ See Osler Report, *supra*, note 2, at 39.

¹⁵ S. Wexler, *supra*, note 13, at 1006.

¹⁶ Parkdale Community Legal Services, submission to the Ontario Legal Aid Review (April 14, 1997).

¹⁷ *Legal Aid and the Poor*, *supra*, note 7, at 11.

¹⁸ Janet Mosher and Ian Morrison, “Barriers to Access to Civil Justice for Disadvantaged Groups,” in *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996) at 644.

¹⁹ Clinic Funding Committee, submission to the Ontario Legal Aid Review (March 1997).

that a person may find impossible to navigate alone. In the criminal courts, how can we be sure that an accused person with a learning or mental disability will understand the various stages of the proceeding and the consequences of the decisions he or she makes at every juncture of it? The person whose last resort may be Small Claims Court will be expected to participate in a proceeding that incorporates the complexities and language of the *Rules of Civil Procedure*: jurisdiction, service, motions, default judgement.

The legal system also affects low-income people in systemic ways that accentuate the need for subsidized legal services. For example, low-income groups are heavily represented in the ranks of the criminal justice system, the mental health system, and the child protection system. How more disadvantaged and more marginalized members of our community are policed is a matter of concern for those involved in the criminal justice system, as are the effects of laws, neutral on their face, on someone who may be uneducated, someone who may be homeless, or someone who may be mentally ill. As many of the submissions to the Review have argued, low-income people need access to legal representation when they come into contact with the kinds of legal regimes that intrude upon people's lives in some of the most extreme ways imaginable: involuntary treatment, incarceration, the apprehension of a child. In sum, the lives of low-income people are regulated in ways that are overarching, complex, intersecting, and intrusive.

The Osler Report warned against drawing inferences from a middle-class standard when we consider what the legal needs of the poor might be.²⁰ First, low-income people often lack the resources and skills necessary to investigate and follow up on legal entitlements and protections. Second, there are whole areas of law which apply only to low-income people. Third, there are often special legal needs that flow from the circumstances of a person's poverty. The discussion below highlights some of the areas of legal need experienced by low-income people that are examined in detail in Part II of this report. Also explored below are some of the special needs that various low-income communities in Ontario have identified for the Review.

7. CRIMINAL LAW

Low-income people are heavily represented in the criminal justice system. Services in the area of criminal law, then, are important for those with low-incomes. Most lay people, and indeed even experienced lawyers whose practices do not include criminal law, do not know how to participate in a criminal proceeding. It is a procedurally and technically complex area of law where the need for legal assistance occurs at the various stages of processing a typical charge.

Many accused persons do not understand the role and duties of the police or the Crown. Access to counsel at early stages of a criminal proceeding can have a significant impact on the ultimate disposition of the case. For example, important issues arise at the time of arrest: Is there a right to arrest? Does the accused have to speak to the police? What are the implications of giving a statement to police when in custody? Can an accused or the property of an accused be searched?

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Osler Report, *supra*, note 2, at 45.

If the police or the Crown declines to release the accused on or after arrest, a bail hearing will ensue. Representation can play a significant role in an person's ability to secure release. For example, counsel will ensure that the factors relevant for bail will be put before the court for its consideration. The importance of bail cannot be overstated. Release on bail allows an accused the opportunity to better prepare for the next stages of the proceeding. It also reduces the chance of accused persons entering an inappropriate guilty plea with serious consequences for them. As many submissions to the Review have indicated, pleading guilty to "get it over with" is an increasingly common phenomenon as many more accused are unable to secure legal representation to assist them in the bail process.

Criminal matters often get more complicated as they proceed, and unrepresented accused are in a difficult position when it comes to dealing with the Crown. For example, all criminal matters involve the mandatory full disclosure of the evidence against the accused to the accused or to his or her agent. Such disclosure may be difficult to secure. Further, on the basis on this disclosure, parties may want to negotiate a plea to a lesser included offence. Without experience in the criminal justice system, an accused will simply not know what this means or will not be able to understand the consequences that flow from such a decision. Many criminal matters involve an election by either the Crown or the accused. This will determine how the matter is to be tried. Accused persons need advice about this, and about how it relates to the plea that they want to enter.

Criminal proceedings often involve pre-trials and trials. They are about evidence. They are about legal burdens of proof and evidentiary burdens of proof, and the difference and relation between them. These are very sophisticated legal concepts. How is a witness called? When is a witness called? Who can be a witness? How is a witness examined? What should be entered as an exhibit? How is an exhibit entered? What are the defences that an accused can raise? What are the implications of the accused's testifying in his or her own defence? What are the strengths of the Crown's case and what are the weaknesses?

The consequences of a conviction can be quite severe, including the loss of liberty and other serious sanctions. Sentencing becomes a important issue at the end of the process if an accused is ultimately convicted. Legal representation will ensure that relevant factors and evidence will be put before the court. This can make a significant difference to the ultimate penalty imposed. For persons held within correctional institutions, needs for legal representation have also been identified. In the submission to the Review²¹ from the Correctional Law Project of Queen's University,²² these further needs for legal representation include proceedings involving facility discipline, inmate appeals, and parole board hearings.

The effect of the recent funding cuts to legal aid in Ontario has been to increase the number of unrepresented accused persons in our criminal courts. Many submissions to the Review were critical of this development. As the Ontario Judges Association pointed out in their submission to the Review, to expect an accused to conduct his or her own case is "manifestly unfair". Legal aid is vitally important to maintaining the integrity of the criminal justice system, in part because, according to the Ontario Judges Association, it brings some

²¹ The Ontario Family Law Judges' Association and the Ontario Judges' Association, submission to the Ontario Legal Aid Review (April 12, 1997).

²² Correctional Law Project, Queen's University, submission to the Ontario Legal Aid Review (May 12, 1997).

balance between the resources of the Crown and those of the defence. As one lawyer argued in his submission to the Review, the failure to properly fund the work of the criminal bar can result only in more Marshalls, Morins, or Milgaards, which cost the system in both financial and moral terms.

8. FAMILY LAW

Marriage or family breakdown is a common social occurrence that crosses all religious, ethnic, and class boundaries. For low-income people, however, family breakdown is often accompanied by other problems that have a legal component: housing, income maintenance, or immigration sponsorship. More generally, family law regulates a host of relations, and it cannot be separated from the larger social problems of child poverty, domestic violence, or women's general economic disadvantage. Nor is family law an exclusively private matter, because the state can play a significant role in family law proceedings.

In the area of family law, what issues for low-income people arise? In contrast to a criminal proceeding, this is a more difficult question to answer. First, family law matters are often lengthy and unpredictable. Second, there are a variety of ways in which persons could find themselves confronted with a family law matter—in part, because of the multi-party nature of the proceedings. For example, a father/husband/common-law partner, mother/wife/common-law partner, or same-sex partner/mother/father may litigate interests that could include applications for support, access, or custody. Children, the state, and others who stand in parenting roles, such as grandparents, also have standing to participate in many family law proceedings. Further, changes to the law or changes in circumstance can cause the parties to revisit old arrangements. In some cases, family law litigation extends over decades.

Many factors make family law litigation complex and confusing. First, a collection of statutes regulate the area of family law, including the *Family Law Act*, the *Children's Law Reform Act*, the *Child and Family Services Act*, the *Hague Convention*, the *Reciprocal Enforcement of Support Orders Act*, and the *Charter of Rights and Freedoms*. Second, family law litigation is paper-intensive. The ability to be able to express oneself in writing and to understand and organize a multitude of legal documents is a necessary pre-requisite to being able to participate in any family law proceeding. Third, family law proceedings can be separated into different court systems. Issues of support or custody can be dealt with in the Provincial Court. Divorce and property issues will be dealt with in the Ontario Court, General Division. Unified Family Courts will have jurisdiction over all family matters in the few areas of the province that have them. The issue of which court has jurisdiction is a complicating factor in any family law proceeding. Fourth, the law makes distinctions among adoptive, social, and blood relationships, and among persons who are married, persons who live together, and persons who have children together.

The family law area covers matters such as separation and divorce, and the related issues of property division; child, parental, or spousal support; and custody or access. As the Ontario Family Law Judges Association point out in their submission to the Review, the state initiates as much as 50 per cent of all litigation in matters that include child support applications and child protection proceedings.²³ Family law also intersects with other areas of law such as

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See submission of Ontario Family Law Judges Association and Ontario Judges Association, *supra*, note 21.

estates, tax, criminal, income-maintenance, and immigration. Besides their great complexity and their significant, life-altering consequences, family law matters often involve volatile, vulnerable, or frightened litigants who find proceedings especially difficult to navigate.

In family law, many matters are settled with interim motions. To initiate a motion, a party will have to prepare many documents. These may include applications that address support, custody, property division, or the exclusive possession of the matrimonial home. Many legal questions follow from these categories. What is the matrimonial home? What is family property? How is property like a Canada Pension to be valued and divided? To what kind of support may an applicant be entitled? Does the applicant want a periodic or lump-sum support award? What is the tax treatment of a support order? How will support affect an entitlement to social assistance? What is joint custody?

Applications will be accompanied by Notices of Motion and, often, detailed financial statements. Sworn affidavits will set out the facts on which the matter will be decided. Notice must be given to the other side, and this must conform to the strict requirements of service set out in *The Rules of Civil Procedure*. Counter-applications from the respondent may then be filed before a court date is set.

If a party is dissatisfied with the judgement of the motions court, a trial may be scheduled. Parties then must organize evidence and the case law on which to build their arguments. Many of the same complexities typical of criminal trials exist in a family law trial. What are the rules of evidence? What is the burden of proof? Who should be a witness? How is a witness called? How is a witness examined? What should be entered as an exhibit? How do you enter an exhibit? What is the legislation and case law on which you rely? Where do you find them? How are they organized? Further, the issue of settlement must be explored, but proceeding in this exercise without representation is problematic.

The state can initiate family law proceedings. For example, many child support applications are brought in the names of social assistance recipients. This, in turn, can give rise to a custody or access application on the part of a respondent. The recipient (usually a mother) may then be required to challenge this, especially if there has been a history of physical, psychological, or sexual abuse by the respondent. Another way the state involves itself in family law issues may be with respect to allegations of neglect or abuse reported to a child protection agency. In these cases, the state, and often the child, will be represented. Parents, too, need representation in these investigations and proceedings in order to provide them with information, protect their rights, and argue their interests.

The low-income family that experiences family breakdown can have a multitude of legal problems that require a variety of legal services. For example, a family may not have the financial resources to maintain separate residences, which can create difficulties with respect to a family benefit entitlement. Women can be criminally prosecuted for social assistance overpayments when they have relationships with men, even though these men do not appear to conform to any commonly understood definitions of "spouse", "father", or "husband". Sole-support mothers may experience discrimination in housing because of their family status or the source of their income. The spectre of domestic violence or sexual assault may create needs for the intervention of the criminal law, restraining orders or supervised access. In the area of family law, legal needs are wide-ranging, and sometimes desperate.

9. CIVIL AND ADMINISTRATIVE LAW

Many of the areas of law subsumed by the term “poverty law” involve the practice of civil or administrative law. In their submission to the Review, the Workers’ Compensation Appeals Tribunal²⁴ wrote that “the validity and importance of legal aid funding is nowhere more apparent than in the workings of the administrative justice system,” where issues in administrative law “provide or enforce benefits or legal rights or interests that are often of the most vital importance in individual people’s lives, and many of these people live in poverty.” This point is also emphasized by the National Council of Welfare when they argue, in *Legal Aid and the Poor*, that low-income people have a much greater need for civil law services than do people with average incomes.²⁵

As mentioned above, many Ontarians move in and out of poverty as their employment circumstances change. According to a study by the Economic Council of Canada, 27 percent of working-aged Canadians who are poor in any one year escape the condition the next.²⁶ Administrative schemes such as Employment Insurance, Welfare, Workers’ Compensation, and the Canada Pension Plan (CPP) play a significant role in assisting people when they leave the workforce on either a temporary or a more prolonged basis. The provision of legal services, information, and assistance in these areas is very important as it ensures that people understand their rights, entitlements, and obligations. For example, a person may need legal assistance when he or she lacks the necessary original documentation to make an application for Old Age Security (OAS). A widow may need information about limitation periods when she applies for a survivor’s benefit under the CPP. An unemployed person may need assistance navigating the complicated procedures for entitlement, documentation, and reporting that are part of the Employment Insurance scheme.

In the more general realm of civil law, many submissions to the Review continue to reflect the observations made by the Osler Report with respect to the impact that civil law has on the lives of those with low-incomes: although legislation dealing with consumer rights, the relationship of landlord and tenant, social benefits, economic and other anti-discrimination rules, immigration matters, civil rights, and workers’ compensation “is almost invariably expressed in general terms, ... a very high proportion of it affects poor people more directly and intrinsically than a person of means or affluence”.²⁷

For example, many middle-class people will move from one apartment to another when they experience difficulties with their landlord. A low-income person will often not have this choice and will need to rely on the provisions of the *Landlord and Tenant Act* to assert his or her rights. In the area of employment termination, a low-income person must rely on the changing provisions of the *Employment Standards Act* to seek a remedy, whereas a middle-class person is in a much better position to negotiate a proper severance package. In the case

²⁴ Workers’ Compensation Appeals Tribunal, submission to the Ontario Legal Aid Review (March 6, 1997).

²⁵ *Legal Aid and the Poor*, *supra*, note 7, at 10.

²⁶ David P. Ross, *The Canadian Fact Book on Poverty—1994* (Ottawa: Canadian Council on Social Development, 1994) at 31.

²⁷ See Osler Report, *supra*, note 2, at 19.

of medical malpractice or traffic accidents, low-income people usually will not have a relationship with an insurance company who may advocate on their behalf to improve the terms of a settlement.

10. SPECIAL LEGAL NEEDS

The problems of poverty are shared by everyone who is poor, but some low-income groups experience additional barriers that contribute to even more hardship than their poverty would otherwise cause. We are not proposing to list factors or characteristics that represent the only barriers that people encounter in their struggles for equality and justice. That list would be long, complex, and intersecting. What we do want to do is use some of the information provided by the various background papers and submissions to discuss some of the particular needs for legal services experienced by particular communities of low-income people in Ontario.

For example, two background papers prepared for the Review canvass the needs for legal services for Aboriginal communities across Ontario.²⁸ In the North, urgent needs exist for appropriate translation services because most people do not have English as a first language. Communities also need improvements in local court administration and increased availability of legal services. More fundamentally, there exist the problems of having a justice system imposed on people for whom it is not culturally relevant, and service providers who do not have a sufficient understanding of Aboriginal culture.

As well, Aboriginal communities have particular legal needs that flow from both the *Indian Act* and the *Constitution Act* relating to status, land, economic development, taxation, and treaty rights. There is also a need for legal assistance in the areas of law that govern hunting and fishing regulations.

In a background paper prepared for the Review by the Advocacy Resource Centre for the Handicapped,²⁹ criminal justice, involuntary committal, and substitute decision-making were identified as legal areas of particular significance to persons with disabilities.

For example, in the area of civil law, people with mental disabilities face many situations in which they may lose the right to make their own decisions about fundamental aspects of their life, and, further, may need legal assistance to get access to their own financial resources in order to pay for representation. In the area of criminal law, persons with mental disabilities may be found not criminally responsible and held in custody, notwithstanding the nature of the offence. People with mental and physical disabilities also require advocates with particular legal, social, and communication skills.

Many elderly Ontarians are disabled or experience some form of physical or mental limitation. Many live in health care facilities or institutions. Legal issues of importance identified by organizations such as the Family Services Association of Metropolitan Toronto and the Advocacy Centre for the Elderly relate to these circumstances, and include human

²⁸ J. Rudin, "Legal Aid Needs of Aboriginal People in Urban Areas and on Southern Reserves" and D. Auger, "Legal Aid, Aboriginal People, and the Legal Problems Faced by Persons of Aboriginal Descent in Northern Ontario", background papers prepared for the Ontario Legal Aid Review, Vol II, this report.

²⁹ P. Bregman, "Special Legal Needs of People with Mental Disabilities", a background paper prepared for the Ontario Legal Aid Review, Vol II, this report.

rights, powers of attorney, wills and estates, and issues relating to decision-making. Further, many seniors are dependent on services provided by large bureaucracies that may not be easily accessible to them.

Despite being guaranteed access to the courts in French with the amending of the *Courts of Justice Act* in 1984, francophone Ontarians face considerable institutional barriers when trying to access the justice system in French. These include legal aid offices not offering services in French of equal quality to those services offered in English; little or no bilingual signage or materials; the failure to identify French-speaking lawyers on Plan referral lists; and the unavailability of bilingual duty counsel.

While racial and ethnic minorities experience many of the same problems that other groups of low-income Ontarians face, the issue of race and ethnicity often exacerbates their difficulties. For example, issues of discrimination can factor prominently in the areas of housing and employment, or, indeed, the administration of justice itself. As the submission to the Review by the Metro Toronto Chinese & Southeast Asian Legal Clinic³⁰ argues, many people of colour also experience language or cultural barriers in the legal system for which accommodation needs to be made.

Many submissions to the Review focus on the particular legal problems of women and their needs with respect to legal services. As the National Council of Welfare observed, women's "special problems loom large in the provision of legal aid services".³¹ Women, and especially women who are the single heads of households with dependent children, are overrepresented in the ranks of the poor.³² Legal issues often cluster in the areas of family and civil law, arising as a consequence of both this status and the poverty that accompanies it, and some of the legal difficulties that women face have been outlined in the earlier discussion of family law. Further, many workplace issues of particular importance to women, such as sexual harassment, pay equity and maternity leave, create the need for legal advice and assistance.

11. CONCLUSION

A legal aid system should focus on client needs, their range, and their diversity. The legal aid system should monitor the changing landscape of client needs and, more particularly, utilize the clinic system, duty counsel, and Plan administrators as potentially efficient means of doing so. The difficulty of identifying needs and their changing nature speaks to the importance of developing and enhancing the systemic ability to identify and measure them.

³⁰ Metro Toronto Chinese and Southeast Asian Legal Clinic, submission to the Ontario Legal Aid Review (March 27, 1997).

³¹ *Legal Aid and the Poor*, *supra*, note 7, at 12.

³² *The Canadian Fact Book on Poverty*, *supra*, note 26, at 50.

12. RECOMMENDATIONS

1. The design of the legal aid system should be based on the assessment of the specific legal needs of low-income Ontarians.
2. The design of the legal aid system, while reflecting these needs, should also address the diversity of special needs presented by such groups as ethnic, racial, cultural, and linguistic minorities, persons with disabilities; Aboriginal communities; women; children; youth; and the elderly.
3. The legal aid system should enhance its central and local capacity to gather and assess information regarding client needs.
4. The legal aid system should more effectively rely upon the clinic system, Plan administrators, and other service providers as a means of systematically gathering information with respect to legal needs.

A FRAMEWORK FOR SETTING PRIORITIES FOR LEGAL AID SERVICES

Management of the legal aid system has always required that those engaged in its administration set priorities for the system. For the most part, the history of Ontario's system has been one of expansion. In this context, its management typically involves a determination of which new area of service provision should be accorded the highest priority in allocating new resources. Expansion of the system in this sense has, however, been a rarer occurrence in the last decade or so. More recently, of course, the legal aid system has been subjected to a funding cap which has required that priorities be set in terms of which services should be reduced or eliminated. As a matter of policy-making and implementation, it is a much more difficult exercise to reduce or eliminate services already in existence. This chapter addresses the implications of capped funding for the process of priority-setting in the legal aid system.

Thinking about the problem of priority-setting for legal aid in the context of fixed resources leads to a consideration of some fundamental questions of public policy. Upon what principled basis can a decision be made to give priority in resource allocations for legal aid spending to criminal law, for example, as opposed to family law, or refugee and immigration law? Is this question illuminated by trying to determine what the nature or source of the state's obligation to fund legal aid is in the first place? Working from first principles in this way, is it possible to identify a rank-ordering of legal aid expenditures which would enable policy-makers to make service cuts on a principled basis in an era of fiscal constraints? The next section of this chapter considers questions of this kind.

The chapter then considers the legal constraints which impose an obligation on the province of Ontario to fund legal aid services. The province is required by the law of the Canadian Constitution and by some federal statutes to provide legal aid services in particular contexts. These legal obligations are, to some extent, informed by Canada's commitment to the *International Covenant on Civil and Political Rights*.¹ We briefly examine each of these requirements for two reasons. First, the existence of law of this kind offers some evidence of priority-setting in the legal aid field by legislators. Second, the existence of these legal requirements constrains, to some extent, the ability of the province of Ontario to set its own priorities in the legal aid field. We attempt to provide some measure of the present and possible future impact of these constraints on provincial priority-setting.

¹ 999 U.N.T.S. 171.

Against this background, we provide a brief account of priority-setting in the legal aid system in Ontario in recent years with a view to determining what can be learned from that experience. We first examine priority-setting on the certificate side of the system under the 1994 Memorandum of Understanding, and then offer a brief account of priority-setting in the clinic system. The final section of this chapter outlines a new model for priority-setting in the legal aid system in Ontario.

1. NORMATIVE JUSTIFICATIONS FOR LEGAL AID

In order to identify the underlying moral or political justification for the state's obligation to provide legal aid, if indeed it has one, some basic issues of political or democratic theory must be considered. Our purpose in doing so is to inform our understanding of how priority-setting, as a matter of principle, might best be conducted in the legal aid context. It might be assumed that the most fruitful analytical path for achieving this purpose is to identify the normative justifications for the state's obligation to provide legal aid in particular contexts such as criminal law and family law, evaluate those justifications with a view to placing them in an order which would suggest, at the level of general principle, that preference should be given to the funding of criminal law or family law legal aid or vice versa.

We have come to the conclusion that such an approach is not fruitful. In coming to this conclusion, we have been much influenced by a thoughtful background paper prepared for the Review by Professor David Dyzenhaus.² Indeed, in his view, this approach, which he terms the "box approach", is misguided. In what follows we suggest that the underlying normative foundation for the state's obligation to provide some form of legal aid is to be found in Canadians' shared commitment to the Rule of Law as an essential feature of the Canadian political system. Further, we attempt to demonstrate why the "box approach" to priority-setting is not satisfactory and, more particularly, why a preoccupation with the value of avoiding incarceration, or "negative liberty", will distort priority-setting for legal aid. Finally, we identify the implications of these conclusions for legal aid priority-setting.

(a) LEGAL AID AND THE RULE OF LAW

The development of democratic societies has been accompanied by the adoption of the notion of the Rule of Law—the replacement of rule by arbitrary measures or by unchecked discretion with rule by law. A well-known statement of the centrality of the concept of the Rule of Law is that of F.A. Hayek, in his essay "Planning and the Rule of Law".³

Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all its technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its force and powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

² D. Dyzenhaus, "Normative Justifications for the Provision of Legal Aid", a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report, upon which portions of the discussion in this section are based.

³ F.A. Hayek, *The Road to Serfdom*, 50th anniv. ed. (Chicago: University of Chicago Press, 1994) at 80.

Two features of the concept of the Rule of Law are particularly relevant in the present context. First, it is inherent in the notion of substituting or replacing arbitrary measures with legal rules that the rules can be known. As Hayek says, the rules must be fixed and announced beforehand. Dyzenhaus refers to this as the “publicity” condition of law.⁴ Secret law is anathema in a democratic society. The promise of a democratic society that each of its citizens will have equal protection under its laws will be empty if that society fails to meet the publicity condition.

Second, it is implicit in the notion of the Rule of Law that the state’s obligation is not one of merely disclosing the law, but rather one of disclosing the law in a fashion which makes it accessible to the individual. Individuals must have access to the law, in the sense that they are enabled to understand their obligations or their rights, as against the state, and to plan their affairs accordingly.

The link between the Rule of Law, then, and an obligation of some kind imposed upon the state to provide assistance to citizens in facilitating their understanding of the law is this: If a state enacts or develops laws which are so complex that many of those who are subject to those laws cannot acquire equal, or perhaps any, understanding of them, such that they can neither understand nor use them, the laws to which they are subject do not meet the publicity condition. There is arguably, therefore, a state obligation of some kind to facilitate meaningful access to its laws. If, for example, our criminal law or social assistance or family law has become very complex, as indeed it has in many areas, the fact that many citizens cannot, without the state’s assistance, respond to or cope with that law suggests that the Rule of Law will be undermined if that assistance is not forthcoming.

We do not wish to suggest, however, that the commitment of Canadians to the concept of the Rule of Law leads inescapably to the conclusion that the state has an unlimited obligation to provide, at public expense, lawyers to all citizens who encounter difficulty in obtaining access any particular law. Rather, our point is a more modest one. In a democratic society committed to the Rule of Law, a publicity condition is inherent in the use of law by the state, and the complexity of that law may, in turn, impose an obligation on the state to facilitate access to the effective use of that law in some fashion. The more complex the law in question, and the greater its impact on individuals who lack the means to acquire help in understanding it, the more intense will be the burdens imposed on the state by the publicity condition. The individual’s interest in or entitlement to access to the law thus appears to be inherent in a decision by the state to utilize law to accomplish a particular social or political objective.

While we do not believe that the foregoing principles are controversial, it must be noted that the concept of the Rule of Law is a source of important controversies on questions of political theory and the proper role of law and the state. Hayek, for example, would argue that governments should be reluctant to use law to intervene in the lives of individuals. His premise is the libertarian one: that the space of “negative liberty” (one’s liberty to do as one pleases) should be left as large as is consistent with maintaining minimal public order. Intervention beyond that minimum requirement would, in his view, introduce unnecessary uncertainty into the law.

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Dyzenhaus, *supra*, note 2.

Other theorists argue that the virtue of the Rule of Law is merely instrumental, in the sense that law can be used to implement political values other than that of "negative liberty".⁵ Still others would argue that the ideal of the Rule of Law is equality, and attempt to show a necessary connection between the Rule of Law and liberal or democratic political philosophies.⁶ As one can imagine, across the broad spectrum of opinion of this kind, one encounters serious debates as to the appropriateness of government regulation of certain activities, the extent to which health care and other social benefits should be seen as entitlements, and so on.

For our purposes, these controversies concerning the ideological content of the notion of the Rule of Law, are, we believe, beside the point. The publicity condition, and the consequent obligation of the state to facilitate meaningful access to the use of law, flow from a decision by the state to use law. These ideological controversies, of course, relate to the question of whether or not the state should use law in the first place. Once that decision has been taken, however, the publicity condition is engaged, and the state is implicated in the problem of ensuring access to the law. This ideological debate is beside the point for our purposes, then, because the legal system in Canada and in Ontario has clearly taken a position that laws—and often very cumbersome ones—will be utilized to implement a broad range of values and programs. Thus, while some may wish to debate whether or not particular uses of law are appropriate, there is no doubt that its widespread use is already entailed in the law of Ontario and Canada and has become part of our social and legal fabric. In short, legal aid must take the legal system as it finds it.

As a matter of principle, then, the underlying rationale for the state's obligation to facilitate access to the law is not restricted to any particular kind of law or type of legal situation. The normative foundations for legal aid do not assist us in making an argument for giving priority to one domain of law over another in terms of access to legal aid resources.

One further implication of some importance can be drawn from the relationship of the Rule of Law, through the publicity condition, to the state's obligation to facilitate access to the law. To the extent that the law is needlessly complex or in some other respect designed in a manner that indirectly or, indeed, directly requires legal advice and assistance, it may be that the legal regime in question has unnecessarily imposed burdens on the state to facilitate access to the law. If, for example, the defective design of a particular statutory scheme makes it necessary that individualized legal problems be handled on a case-by-case basis, the defect in question will have imposed on the parties, and upon the state, a very expensive burden. In some instances, then, the state's obligation to facilitate access might be much better served by removing the defect from the statutory scheme. This is, in our view, an important point, and one which we discuss at some length in chapter 6 of this report.

⁵ See, e.g., J. Raz, "The Rule of Law and Its Virtue", in *The Authority of Law: Essays on Law and Morality* (Oxford: The Clarendon Press, 1983) at 210.

⁶ See, e.g., R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985).

(b) BEYOND “NEGATIVE LIBERTY”

Having set out our conclusion that an examination of the normative foundations of legal aid does not provide a principled basis for giving priority access to legal aid resources to one legal domain over another, we must consider at some length a serious argument to the contrary. Some would suggest that it is easiest to justify imposition of an obligation on the state to fund legal aid in the criminal law context. Two reasons for this suggestion are typically offered.

First, it is suggested that it is in the domain of criminal law that the accused individual is at risk of losing his or her physical liberty, and this factor engages the important value we place on not losing one’s freedom, or the “negative liberty” interest. Second, in the context of criminal law, the accused is pitted against the massive resources of the state, and it may be argued that simple obligations of fairness require the state to provide assistance to an accused person facing such an unequal contest. For reasons such as these, it is arguable that the allocation of public resources to legal aid in the criminal law context can be defended on grounds that are unrelated to the publicity condition and the Rule of Law.

It is important that these arguments be examined carefully in the present context as it appears that considerations of this kind lead some to argue either that legal aid for criminal law should trump legal aid in other domains such as family or “poverty law”, or that, within the domain of criminal law, the “negative liberty” interest should trump the need for legal aid resources in cases where no significant risk of incarceration is present. Our response to these suggestions is that, on closer examination, the “negative liberty” test does not seem to be capable of drawing satisfactory distinctions between criminal law and other legal domains, or indeed of establishing a satisfactory priority test within the domain of criminal law itself.

The appeal of the “negative liberty” test or principle may arise from the fact that most observers would agree that it identifies a factual situation in which a compelling case for some form of legal aid is made. What the principle appears to be incapable of doing, however, is successfully identifying contrasting situations in which either no legal aid is appropriate or only some inherently lesser claim to legal aid can be made. Thus, within the domain of criminal law, for example, it is not difficult to imagine cases involving no risk of incarceration in which the claim for legal aid appears stronger than in some kinds of cases involving that risk. Thus, a young adult charged with a first offence who has difficulty communicating and for whom a conviction might result in a loss of employment and other negative consequences that may flow from acquiring a criminal record may appear to make a stronger claim for legal aid than someone who has been convicted several times before, faces an overwhelming and uncomplicated case, is able to communicate and knowledgeable about the justice system, and risks only a short period of incarceration about which he or she is not particularly troubled.

It is simply incorrect, then, to suggest that in any case where incarceration is a risk because of, for example, a failure to appear, the claim for legal aid resources is inescapably stronger than in any other case where physical liberty is not at risk. This suggests that there are other values or interests at stake in considering the allocation of legal aid resources within the context of criminal law. It may be difficult to articulate the nature of the broader range of interests at issue—Dyzenhaus has suggested that a broader notion of personal

autonomy may be illuminating⁷—but the important point for our purposes is that there appears to be a plurality of interests underlying the claim for legal aid in the context of criminal law, and that “negative liberty” cannot serve as a reliable guide to the cases most deserving of legal aid.

Similarly, the “negative liberty” test is not particularly helpful in drawing clear distinctions for priority-setting purposes between criminal law and other legal domains. In the first place, it can be and has been argued that “negative liberty” interests are often at stake in other legal domains. In refugee determinations, for example, the unsuccessful claimants may well face a period of incarceration, or worse, if returned to their jurisdiction of origin. The involuntary civil commitment of a psychiatric patient, although clearly not a criminal law matter, unquestionably engages the “negative liberty” interest. In the family law context, some observers have argued, in effect, that “negative liberty” issues are often at stake.⁸ Thus, for example, where an administrative agency threatens to remove a child from the family home because of an allegedly unsafe environment, the situation might be characterized as involving “negative liberty” (at least for the child) and, indeed, as one which places the family in a contest with a powerful agency of the state. Cases of domestic violence where the victim is in need of legal assistance simply to get out of the home or to establish any freedom of movement in the community may also be considered to engage the “negative liberty” interest. In short, the boundaries between the domains based on the “negative liberty” test begin to crumble on closer examination.

More important, perhaps, the kinds of cases in these other domains which would fail a “negative liberty” test are not necessarily less deserving than many criminal law “negative liberty” cases. Where, for example, an unemployed single parent is seeking to enforce legal entitlements to housing or to sources of income, such as workers’ compensation, employment insurance, or welfare, the claim for access to legal aid resources may appear stronger than the claim of someone charged for the second time with impaired driving who may face a short period of incarceration if convicted. Indeed, it may well be that an opinion survey of people experiencing poverty would reveal that they rank claims for legal assistance to enforce their entitlement to the basic necessities of life somewhat higher, as a general proposition, than claims they, too, might make for legal aid in criminal law matters.

Further, within other domains, the inability of the “negative liberty” test to function as a sure guide to the most important cases repeats itself. Thus, in the context of family law, while it may well be the case generally that situations of physical abuse can make a greater claim to legal aid resources than those where it is not present, generalizations of this kind tells us very little about the claim of a particular woman in a situation of non-physical abuse. Nor is it difficult to imagine situations in which the health or safety of a spouse or children may be at risk in a case not involving physical abuse where the claim for legal aid resources may appear to be at least as strong as that in some cases involving physical abuse.

⁷ Dyzenhaus, *supra*, note 2.

⁸ See e.g. P. Hughes, “The Gendered Nature of Legal Aid:”, in F.H. Zemans, P. Monhan, and A. Thomas, eds. *A New Legal Aid Plan for Ontario: Background Papers* (North York, Ont.: York University Centre for Public Law and Public Policy, 1997); M.J. Mossman, “Gender Equality, Family Law and Access to Justice” (1994), 8 *Int’l. J.L. & Fam.* 357.

Custody claims where the current custodial parent poses a grave threat to the emotional health of a vulnerable child offer one illustration of this point.

Focusing on the “negative liberty” interest as a test for the worthiness of claims to legal aid resources, then, leads to a number of difficulties or distortions. First, the “negative liberty” test tantalizingly suggests a clear basis for assigning priority to the need for legal aid resources in criminal law over other areas of law and, within criminal law, for granting priority to cases involving the risk of incarceration. And yet, when the ability of the “negative liberty” test to accomplish these objectives is examined carefully, it appears incapable of providing persuasive grounds for drawing such distinctions.

Second, when a focus on “negative liberty” is extended to other legal domains, it obscures the analysis of priority-setting in those domains. For example, an attempt to set priorities on the basis of the “negative liberty” test appears to obscure the interests at stake in the family law context. Although a case in which a social service agency threatens to remove a child from his or her home may be said to engage the child’s “negative liberty” interest, the interests at stake in such a case are not fully, or even best, characterized as related to “negative liberty”. Here the invasion of liberty is not designed as punishment, but rather as the product of a decision, however misguided it might be, that removal of the child from the home is, in the agency’s view, in the best interests of the child.

Finally, focusing on the “negative liberty” test as a basis for identifying priorities for legal aid runs the risk, especially in the context of capped funding, of creating a legal aid system which favours the interests of men, who are normally those accused of crime, as opposed to those of women, who are more frequently in need of family law or related “poverty law” services than are men. In the recent debates on legal aid in Ontario, many have commented on the patent unfairness that would result if, in the context of domestic violence, legal aid resources were to be made available to the accused male spouse for the assault charge but denied to the victim female spouse pursuing family law remedies in order to deter further the injuries to herself or her children resulting from the abuse.

For all of these reasons, then, we have come to the conclusion that the “negative liberty” interest does not provide a satisfactory basis for a rank-ordering of claims to legal aid resources from one legal domain to the next or, indeed, within particular legal domains. Although the “negative liberty” interest is, indeed, one of the important normative justifications for providing legal aid, it is only one of several such interests. Focusing on the “negative liberty” interest for priority-setting purposes at the expense of others will lead, we suggest, to a distorted analysis of the relative weight to be given to any particular claim for legal aid.

(c) CONCLUSION

Our conclusion, then, is that an examination of the normative foundations for legal aid supports the notion that the state has an obligation, varying with the circumstances at issue, to facilitate access to law. This obligation flows from the condition of publicity, which is an inherent requirement in the use of law in a society such as ours, which accepts the fundamental importance of the Rule of Law. Where the law deployed by the state is complex, and affects important interests of those with limited means, the publicity condition will require the state to facilitate access to the law. Legal aid is one, but not the only, device that might be used to meet that obligation. Another, for example, might be to render

the law less complex. An examination of the normative justifications for legal aid does not, however, appear to provide a basis for a rank-ordering of claims that might be made by various legal domains, nor, within such domains, a basis for rank-ordering the claims of particular case types. More specifically, the interest in “negative liberty” does not appear to facilitate such an exercise. Indeed, we adopt the view that undue reliance on the “negative liberty” interest causes a number of distortions in the analysis of the relative weight of particular claims for access to legal aid resources.

The interests that support claims to legal aid resources are various, both within criminal law and in other fields. Analysis at the level of general principle, then, suggests that priority-setting in legal aid should be premised on the assumption that a rank-ordering of this kind cannot be sustained. Further, our difficulty in identifying general principles which will facilitate a rank-ordering of entitlements to legal aid suggests that priority-setting in the legal aid context needs to be based on the circumstances of particular cases and the parties to them, should retain an element of flexibility, and should be subject to revision in the light of experience.

2. LEGAL OBLIGATIONS OF THE STATE TO PROVIDE LEGAL AID

This section outlines the constitutional and statutory law which imposes legal obligations on the province to fund legal aid services.⁹ Principal attention is focused on those guarantees in the *Canadian Charter of Rights and Freedoms*¹⁰ which appear to impose such an obligation. Brief reference is also made to relevant provisions of the *International Covenant on Civil and Political Rights*¹¹ and to federal statutory schemes which provide a right to counsel funded by the provinces.

As a preliminary point, however, it is useful to describe the discretion exercised by the Courts, prior to the adoption of the *Charter*, to give effect to a right to counsel in cases where Courts determine that their presence if counsel is necessary in order to conduct a fair trial. The accused in a criminal case has a statutory right to make a “full answer and defence” to the charges laid.¹² Canadian Courts have taken the view that the appointment of counsel might be necessary in a particular case in order to enable the accused to exercise that statutory right.

Although at one time it was the occasional practice of Courts to appoint counsel who would then act on a *pro bono* basis, in more recent years Courts have acted on the assumption that, if the Court indicated that defence counsel should be appointed, then either the Attorney General of the province or the province’s legal aid plan would appoint and compensate counsel.¹³ It is not entirely clear what course could be followed if the Attorney

⁹ See, generally, N. Des Rosiers, “The Legal and Constitutional Requirements for Legal Aid”, a background paper prepared for the Ontario Legal Aid Review (1997), Vol. II, this report.

¹⁰ Schedule B to the *Canada Act 1982*, U.K. 1982, c. 11 [hereinafter *Charter*].

¹¹ *Supra*, note 1.

¹² *Criminal Code*, R.S.C. 1985, c. 46, s. 650(3).

¹³ *Re White and the Queen* (1976), 32 C. C. C. (2d) 478 at 490 (Alta. Q. B.).

General and the legal aid plan refused to appoint counsel,¹⁴ but the practice followed in Ontario appears to have been one of appointing and remunerating counsel in such circumstances.

Although the test for determining whether the Court should exercise a discretion to require counsel has been variously stated by the Courts, the substance of the test is that the Court will exercise this discretion in instances where, because of the complexity of the case, the seriousness of the charges, or other circumstances such as the accused's lack of knowledge or skills, the judge concludes that the presence of counsel is essential for the conduct of a fair trial.¹⁵ In reaching the conclusion that counsel is necessary, Courts were to take into account the duty of the trial judge to assist an unrepresented accused in presenting a full answer and defence.¹⁶ Further, it is accepted that counsel should not be appointed by the Court over the objections of the accused. Accused persons are generally entitled to represent themselves if they so choose.¹⁷

The importance of this judicial discretion for our purposes is twofold. First, notwithstanding the fact that its importance as a source of counsel has been surpassed by the creation of provincial legal aid plans, the existence of this judicial discretion has not been eradicated by them. Accordingly, it is still possible for a Court to exercise such a discretion in favour, for example, of an unrepresented accused who has been denied legal aid. Second, although such arguments on behalf of an unrepresented accused who has been denied legal aid would now be made on the basis of the right to counsel secured by the *Charter*, it would appear that the *Charter* jurisprudence on these issues has to some extent been informed by the experience of the Courts in exercising this earlier discretion to recognize, in effect, a right to publicly funded counsel.

(a) INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Canada is a party to the *International Covenant on Civil and Political Rights* and its Optional Protocol. This international convention or treaty covers much of the same ground as the Canadian *Charter*. In particular, article 14(3)(d) provides for a right to counsel in the following terms:

14.—(3) In the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees, in full equality:

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed of his rights; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

¹⁴ In *Re Ewing* (1973), 18 C. C. C. (2d) 356 (B. C. C. A.) at 365 - 6, Seaton JA suggested that, if a judge concluded that counsel's presence were required for a fair trial and the judicial request for an appointment of counsel was denied, the trial judge might be "obliged to stop the proceedings until the difficulties had been overcome. " We are not aware, however, of an Ontario case in which this occurred.

¹⁵ See e.g., *Re White and the Queen*, *supra*, note 14.

¹⁶ See the authorities collected in B. MacFarlane, *The Right-to-counsel at Trial and on Appeal*, (1990) 32 Crim. L. Q. 440 at 452, n. 43. Cf. Des Rosiers, *supra*, note 9, at fn. 120, for criticism of this approach.

¹⁷ *Vescio v. The King* (1948), 92 C.C.C. 161 (S.C.C.) .

Canada's ratification of this convention does not, in itself, make the convention and, more particularly, article 14(3)(d) part of the domestic law of Canada. Nonetheless, this provision is of some importance to discussion here as it is clear that, at the very least, the *Covenant* protection of a right to counsel will be used by Canadian courts as a reference for interpreting the relevant provisions of the Canadian *Charter*.¹⁸

The right to counsel afforded by this article is circumscribed in various ways. The right is available only in the context of a criminal charge. Further, although choice of counsel is conferred generally on persons who have been charged, the right to counsel for those who cannot afford representation is the lesser right of having counsel "assigned" to the accused. The right to assigned counsel may be more generously available than that envisaged in some provincial legal aid plans, however, because it applies to all who do not have "sufficient means" to pay for representation. This could include a larger group of accused persons than those identified by eligibility tests in at least some provincial legal aid schemes. An accused person of modest means, who may not be eligible for provincial legal aid, might well be unable to afford to retain counsel in a complex and lengthy matter.

(b) THE RIGHT TO COUNSEL UNDER THE CANADIAN *CHARTER OF RIGHTS AND FREEDOMS*

There are a number of guarantees set forth in the *Charter* which either provide a clear foundation for a constitutional right to counsel under current law or have the potential to provide a basis for expansion of this right as Canadian constitutional law on this topic continues to evolve over time. The relevant sections are:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

....

10. Everyone has the right on arrest or detention

(d) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right;

11. Any person charged with an offence has the right....

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Two further provisions of the *Charter* are relevant to this discussion. First, section 24(1) of the *Charter* provides that the Courts may, in a case of *Charter* breach, grant "such remedy as the Court considers appropriate and just in the circumstances". Second, in the event that a Court finds that an invasion of one of the rights secured by

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See, e.g., *R. v. Brydges*, [1990] 1 S.C.R. 190. And see J. Claydon, *International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms* (1982), 4 Sup. Ct. L. Rev. 287 at 294.

sections such as sections 7, 10, 11(d), or 15 has occurred, section 1 provides that the limitation on the right will be held not to be a contravention of the *Charter* if it comes within the class of “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Thus, if a provincial statute establishing a legal aid scheme failed to meet one of the requirements of the *Charter* set forth above, the province would nonetheless have an opportunity to defend the limitation on the *Charter* right on the basis of the section 1 test.

Of the four *Charter* protections set out above, the first three sections 7, 10, and 11(d) relate more directly to a right to counsel than does section 15. Indeed, one of the interesting questions for jurisprudence in this area is whether the equality rights secured by section 15 may be considered to have some impact on the question of the right to counsel. Of the three provisions more directly related to the right to counsel, it is obvious that section 10 speaks rather narrowly to rights conferred upon an individual on the occasion of an arrest or detention. Sections 7 and 11(d), on the other hand, appear to have been used interchangeably to provide a foundation for a constitutional right to counsel at trial in the criminal law context. Of the two, however, it is only section 11(d) which, in its own terms, is limited to that context. Section 7 is, in this sense, a more broadly conceived *Charter* right. Accordingly, a second interesting question for Canadian jurisprudence on the right to counsel is whether a more expansive treatment of the constitutional right to counsel may emerge from the evolving jurisprudence of section 7. We examine each of these three protections briefly before turning to a discussion of equality rights under section 15.

(c) RIGHTS UPON ARREST OR DETENTION UNDER SECTION 10(B)

Section 10(b) confers a right to retain and instruct counsel without delay and, as well, the right to be informed of that right upon arrest or detention. The jurisprudence of section 10(b) clearly indicates that this section does not provide a foundation for a right to counsel at trial is not provided. With respect to the right conferred at the time of arrest or detention, however, the Supreme Court has held that it extends beyond the mere right to hire counsel or to be informed of that right.

In *R. v. Brydges*,¹⁹ the Court held that a detainee should be informed “of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel”.²⁰ The Court also stated that the right to retain and instruct counsel has come to include “in modern Canadian society ... the right to have access to immediate, although temporary, advice from duty counsel irrespective of financial status”.²¹ The Court thus appeared to approve of the availability of such services even if, in *Brydges*, it did not directly require that they be established. Unsurprisingly, however, provinces typically accepted the implicit invitation to set up “hot line” or “1-800 number” duty counsel services, often referred to as “*Brydges* duty counsel”, for the purpose of providing immediate and temporary advice to detainees at public expense.

¹⁹ *Supra*, note 18.

²⁰ *Ibid.*, at 215.

²¹ *Ibid.*

In the later case of *R. v. Prosper*,²² however, the Court clearly indicated that the establishment of “*Brydges* duty counsel” schemes was not, in the Court’s view, mandatory, although the Court further held that there may be real costs, in terms of the admissibility of evidence, entailed for provinces that do not establish such a scheme. With respect to the latter point, the Court was prepared to accept that a province which was unable to provide immediate advice might well be unable to obtain a breath sample within the two-hour evidentiary presumption limit required by the statute. Once the detainee had expressed the desire to see a lawyer, a sample cannot effectively be taken until a reasonable opportunity to consult counsel has been given.

Apart from this very compelling evidentiary incentive for adopting the *Brydges* duty counsel system, however, the Court held that the adoption of such a scheme is not truly mandatory for reasons that may be of broader significance for the interpretation of the right to counsel guarantees under the *Charter*. The Court relied on the legislative history of the *Charter* in holding that it does not expressly guarantee a right to publicly funded counsel. In 1981, an attempt had been made to include in section 10 language similar to article 14(3) of the *International Covenant* requiring the provision of counsel to persons “without sufficient means to pay for counsel” where the interests of justice so require. This proposed amendment was rejected.²³ Further, the Court suggested that imposing a positive obligation to establish such services would constitute an inappropriate interference with the governments’ “allocation of limited resources”.²⁴ The Court also indicated a reluctance to adopt a view which would carry with it the implication that “in provinces and territories where no duty counsel system exists the logical implication would be that all arrests and detention are *prima facie* unconstitutional”.²⁵

(d) THE RIGHT TO A FAIR HEARING UNDER SECTION 11(D)

Section 11(d) secures to a person “charged with an offence” the right to “a fair and public hearing. “A number of proceedings have now established that, in cases of sufficient seriousness and complexity, “the accused cannot receive a fair trial without counsel.”²⁶ In *R. v. Rowbotham*,²⁷ the Court of Appeal for Ontario held that, as a result of the length and complexity of a drug prosecution, the accused was entitled to funded counsel. In other cases, the courts have placed some emphasis on grounding “complexity” on the likelihood of imprisonment, the need for counsel to collect evidence, the number of charges laid, the nature of the issues in the case and the accused’s own ability to deal with them, and procedural aspects such as the possibility of a *voir dire*. “Seriousness” will often be

²² [1994], 3 S.R.C. 236.

²³ See Des Rosiers, *supra*, note 9.

²⁴ See *R. v. Prosper*, *supra*, note 22, at 267.

²⁵ *Ibid.*, at 268.

²⁶ See, e.g., *Deutsche v. Law Society of Upper Canada* (1985), 48 C.R. (3d) 166 at 174-75 (Ont. Div. Ct.); *R. v. Rain*, [1997] 2 W.W.R. 38 (Alta. Q. B.).

²⁷ *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1.

established by the prospect of imprisonment. The courts have not yet clearly determined, however, whether seriousness is also established by the potential loss of livelihood.²⁸

In *Rowbotham*, the Court of Appeal was prepared to enforce the right to counsel even though one of the accused enjoyed a level of income that made her ineligible for assistance under the Plan. It was the court's view that, even though found ineligible, she could not afford to retain counsel for the lengthy proceeding which she faced. In *Rowbotham*, however, and this appears to be the prevailing view in the case law, the court stopped short of ordering that either the Attorney General or the Plan fund the defence. The court noted that the remedial power under section 24(1) of the *Charter* enabled a trial judge to stay a prosecution in a case where the presence of counsel was necessary to secure a fair trial. This would be the appropriate relief, in the court's view, if satisfactory arrangements were not made by the province or the Plan to provide counsel.

Although the courts have thus recognized a right to funded counsel under section 11(d), neither under this section nor under section 7 have the courts secured to the accused a right to choose counsel. Thus, restrictions on choice of counsel or on the amount to be paid to counsel under legal aid plans are not considered to be a constitutional violation.²⁹ On the other hand, courts have taken the view that the right to counsel includes the right to the effective assistance of counsel.³⁰ The threshold to be met in establishing that counsel is ineffective will apparently, however, be a high one. It must be demonstrated both that counsel is incompetent and that, but for the incompetence, a different result might have obtained.

(e) THE RIGHT TO FUNDAMENTAL JUSTICE UNDER SECTION 7

In section 7 the right set out not to be deprived of "life, liberty and security of the person" except in accordance with "the principles of fundamental justice" has provided a second basis for a constitutional right to counsel in serious and complex matters. While section 7 thus covers the same constitutional terrain as section 11(d), the potential scope of section 7 is obviously much wider. The wording of section 7 is sufficiently broad that it could provide a constitutional foundation for publicly funded counsel in the context of appeals in criminal cases and, perhaps, in the context of cases lying outside the domain of criminal law. Attempting to draw conclusions on questions of this kind, however, requires analysis of a body of complex constitutional jurisprudence which will be only briefly alluded to here. It is critical to such an analysis to develop a sense of the views expressed by members of the Supreme Court of Canada on the proper interpretation of the section 7 concepts of "liberty", "security of the person", and "fundamental justice".

(i) Liberty

At a minimum, it appears to be established that the section 7 right to liberty is a right to be free of physical detention imposed by the state either as a result of a criminal

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Cf. *R. v. Rain* [1997] 2 W. W. R. 38 (Alta. Q. B.).

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Panacui v. The Legal Aid Society of Alberta (1988), 54 Alta. L. R. (2d) 342 (Alta. Q. B.); *R. v. Munroe* (1990), 57 C.C.C. (3d) 421 (N.S.C.C.), aff'd, (1990) 59 C.C.C. (3d) (N.S.C.A.).

³⁰

R. v. Garofoli (1988), 41 C. C. C. (3d) 97 (Ont. C.A.); *R. v. Silvini* (1991), 9 C. R. (4th) 233.

prosecution, or indeed, in any other circumstance, as, for example, where individuals with mental disabilities are restrained in some fashion.³¹ The more difficult question is whether the notion of liberty can be expanded to embrace a broader concept of personal autonomy. A majority of the Supreme Court adopted a broader approach of this kind in *B. (R.) v. The Children's Aid Society of Metropolitan Toronto*,³² in which a majority of the Court held that the right to liberty included some degree of parental rights in relation to their children, and a plurality of the majority suggested that the liberty interest was "rooted in the fundamental concepts of human dignity, personal autonomy, and choice in decisions going to the individual's fundamental being".³³

The nature of the threat to liberty required is considered in a recent series of decisions dealing with the principle against self-incrimination. The Supreme Court adopted the view that state compulsion to testify or to produce documents infringes section 7 if refusal to comply may lead to a criminal charge of contempt of court.³⁴ Apparently, then, the threat need not be immediate; it may arise from subsequent proceedings. In one of these cases, the Court adopted this view in the context of a non-criminal proceeding before a provincial securities commission.³⁵

(ii) Security of the Person

As with the liberty interest, the critical question regarding the notion of "security of the person" is whether it extends beyond physical interference with security and beyond the context of the criminal law. Again, the Supreme Court has taken a broader view, at least on the former point. In *Rodrigues v. British Columbia (Attorney General)*,³⁶ a majority of the Supreme Court held that "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these".

(iii) Fundamental Justice

Deprivation of liberty or security of the person can occur only in accord with the principles of fundamental justice. Though it is clear that the notion of fundamental justice includes a concept of "procedural fairness",³⁷ it is not clearly established that procedural fairness would include a right to counsel outside the context of criminal proceedings.

³¹ *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486; *Reference re Criminal Code, sections 193 and 195.1(1)(c)* (1990), 77 C.R. (3d) 1.

³² (1995), 122 D.L.R. (4th) 1 (S.C.C.).

³³ *Ibid.* , at 39, adopting views set forth earlier by Wilson J. in *Morgentaler, Smoling and Scott v. The Queen* (1988), 44 D.L.R. (4th) 385.

³⁴ *R. v. S. (R. J.)*, [1995] 1 S.C.R. 451; *Branch v. British Columbia Securities Commission*, [1995] 2 S.C.R. 3; *R. v. Primeau*, [1985] 2 S.C.R. 60; and *R. v. Jobin*, [1995] 2 S.C.R. 78.

³⁵ *Branch v. British Columbia Securities Commission*, *ibid.*

³⁶ [1993] 3 S.C.R. 519 at 588 per Sopinka J.

³⁷ *Re Singh and Minister of Employment and Immigration* (1985), 17 D. L. R. (4th) 422 (S.C.C.)

Against this background, we briefly consider the prospects for the development in the future of an expanded right to counsel through a more expansive interpretation of the scope of section 7. In a background paper³⁸ prepared for the Review, Professor Des Rosiers argues convincingly that, even if one accepts the current state of the Supreme Court jurisprudence as to the outer reach of section 7, a number of proceedings outside of the strict criminal law context appear to come within the scope of section 7. In the mental health context, proceedings involving a committal or a non-consensual administration of treatment are potentially covered. Family matters where one spouse is confined to the home by violence or threats of violence may be included. Deportation proceedings and determinations of refugee status which raise the prospect of deportation could be covered. Disciplinary actions within prisons which involve a loss of liberty could be covered. The inclusion within section 7 of parental rights in the *B. (R.)* decision suggests that child protection proceedings would be covered. Recognition of the security-of-the-person interests of witnesses suggests that at least an arguable claim for a right to counsel might be made where security is put in issue outside the criminal context. Further, if it is correct to conclude that the possibility of contempt-of-court charges is sufficient to engage section 7, it is arguable that, in the family law context, custody and access disputes would also be within the reach of section 7. It is another matter, of course, whether "fundamental justice" will be considered to require the presence of counsel in complex cases in each of these contexts. Nonetheless, the potential for the extension of section 7 doctrine in this direction appears to be quite real, especially if, as Professor Des Rosiers suggests, the courts were to combine their interpretation of the section 7 interests with a sensitivity to equality issues, a matter to which we now turn.

(f) THE RIGHT TO EQUALITY UNDER SECTION 15

The equality rights secured by section 15 of the *Charter* have not yet been applied by the Courts in the context of legal aid issues. Nonetheless, there appear to be at least three possible lines of argument that could be pursued by individuals seeking to enforce a constitutional right to legal aid. First, it might be argued that distinctions in the level of legal aid resources available to different types of cases which have a differential impact on different groups might constitute discrimination on a prohibited ground under section 15. For example, it might be argued that giving priority to criminal law matters rather than family law matters might have the indirect effect of discrimination on grounds of gender. Similarly if, for example, funding with respect to legal aid relating to mental health issues were severely curtailed or withdrawn, discrimination on the basis of a disability might be argued. Other contexts in which this kind of equality challenge against a legal aid scheme could be mounted can easily be imagined. A second possibility would be to argue that sections 7 and 15 should be read together to develop an approach to security and liberty interests which respects equality guarantees. This could provide a basis for a more extended application of section 7 outside the criminal law context.

Third, and more generally, a constitutional attack on an allegedly inadequate legal aid scheme might be mounted on the basis that the justice system itself is discriminatory on the basis of an analogous ground, that is, poverty. It must be noted, however, that the

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Des Rosiers, *supra*, note 9.

suggestion that poverty constitutes an analogous ground for the purpose of section 15 analysis has not enjoyed success to date.³⁹

(g) DEFENDING LEGAL AID SCHEMES UNDER SECTION 1

Assuming that a denial of access to state-funded legal aid in a particular context were to be held to constitute a violation of any of sections 7, 10, 11(d), or 15 of the *Charter*, the burden would then fall upon the government in question to establish that the invasion of the *Charter* right falls within the category of “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” under section 1 of the *Charter*. If this can be established, of course, the decision or measure in question will not constitute a *Charter* violation. The test for establishing a section 1 justification is well established in the jurisprudence. The government must establish:

- (1) that the impugned law addresses a pressing and substantial objective of sufficient importance to warrant overriding a constitutionally protected right and,
- (2) that the means chosen to attain the objectives of the legislation must be proportional or appropriate to the ends, the so-called proportionality test.⁴⁰

Although it is unlikely that courts would hold that a government objective of reducing expenditures on legal aid is illegitimate, it is nonetheless the case that the proportionality test would provide the courts with some room to substitute their views for those of the legal aid authorities, at least in terms of their chosen priorities. Having said this, however, we should note that the courts have generally been reluctant, in the right to counsel *Charter* jurisprudence, to impose mandatory obligations on the state to spend legal aid resources in a particular way. Indeed, in *R. v. Prosper*,⁴¹ Madam Justice L’Heureux-Dubé stated that “the scope of services available through Legal Aid is generally not, in my opinion, for the courts to decide. The proper allocation of state resources is a matter for the legislature”.⁴² On the other hand, it is not at all clear that courts would refrain from intervening and finding unconstitutionality if confronted with what appeared to be a plainly discriminatory feature of a legal aid scheme or a level of service that was considered to be so inadequate that the judiciary could not preside over fair trials.

(h) CONCLUSION

The current state of right-to-counsel *Charter* jurisprudence, then, appears to impose modest but significant constraints on the design of provincial legal aid schemes. It seems clear that the courts will require funded counsel, at a minimum, in serious and complex cases in the sphere of criminal law where the accused lacks the personal skills to act for him- or herself. There is also some as-yet-unrealized potential for the development of further constitutional doctrine that could be applicable to the design of legal aid schemes.

³⁹ *Masse v. Ontario* (1996), 134 D.L.R. (4th) 20, leave to appeal to Ont. C.A. ref'd., [1996] O.J. 1526, appeal to S.C.C. ref'd., [1996] S.C.C.A. No. 373 [Q.L.].

⁴⁰ *R. v. Oakes*, [1986] 1 S. C. R. 103 at 138 - 40.

⁴¹ *R. v. Prosper*, *supra*, note 22.

⁴² *Ibid.*, at 288.

The principal area of potential growth resides in section 7. On the basis even of current interpretations of the notions of "liberty" and "security of the person", it would appear that section 7 could be considered to be applicable in a variety of contexts beyond the criminal law field. Further, a more expansive interpretation of section 7 might be linked to an equality analysis under section 15 to constrain the ability of a legal aid plan to devise coverage which can have the direct or indirect effect of discriminating against a group identified by either a prohibited or an analogous ground of discrimination pursuant to section 15.

It is, of course, difficult to predict the future course of jurisprudence, especially on matters of this kind. For our purposes, however, it is sufficient to conclude, as we do, that the potential for a more expansive scrutiny of the design of legal aid schemes under *Charter* jurisprudence of this kind appears to be very real and constitutes a consideration that should be kept in mind by those involved in designing legal aid programs. A legal aid scheme focused exclusively on criminal law cases, for example, is not likely to survive constitutional scrutiny.

(i) STATUTORY RIGHTS TO COUNSEL

Provinces are obliged by law to provide publicly funded legal assistance under two pieces of federal legislation, the *Young Offenders Act*⁴³ and several sections of the *Criminal Code*.⁴⁴

(i) The *Young Offenders Act*

Section 11(4) of the *Young Offenders Act* establishes a clear entitlement to publicly funded legal assistance for youths charged with offences under that legislation. The provision which requires that such assistance be made available on a mandatory basis, once requested, reads as follows:

11.—(4) Where a young person at his trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth court ...

- (a) shall, where there is a legal aid or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or
- (b) where no legal aid or assistance program is available or the young person is unable to obtain counsel through such a program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

(5) Where a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General of the province in which the direction is made shall appoint counsel, or cause counsel to be appointed, to represent the young person.

In essence, then, the Act stipulates that a young person seeking counsel be referred to the provincial legal aid program and, where legal aid is unavailable, counsel shall be provided at provincial public expense on a mandatory basis if the youth requests counsel

⁴³ R. S. C. , 1985, c. Y-1.

⁴⁴ R. S. C. 1985, c. C-46.

and, in the absence of a request, at the discretion of the trial judge. Although the statute directs that the Attorney General provide and, implicitly, pay for counsel, the typical arrangement, as in Ontario, is that the counsel is paid by the Legal Aid Plan at legal aid rates. The ability of the Plan to deny a young person a legal aid certificate in Ontario is thus more theoretical than real. Moreover, it is accepted that the trial judge has no discretion to inquire into the means of the youth or the parents in question to fund representation, since a judge has no discretion to withhold an order directing representation once it has been requested.⁴⁵

The service coverage afforded by the Act is broadly conceived in the sense that, according to section 11(1), it applies to "every stage of the proceedings". Further, unlike the right-to-counsel jurisprudence concerning adults, publicly funded representation for young persons is not limited to cases which are "serious and complex". Although the practice in Ontario has been to provide young persons who are granted certificates their choice of counsel, the Act does not so require. The Act would not preclude, therefore, the establishment of a specialist panel to deal with youth cases, nor, presumably, a Staff Office or an assigned counsel system.

(ii) *Criminal Code*

The provisions of the *Criminal Code* dealing with accused persons who suffer from a mental disorder contain two sections which establish a right to counsel. The first, section 672.24, provides that the Court shall order representation for an accused in any case where the Court "has reasonable grounds to believe that an accused is unfit to stand trial". The second, section 672.5(8), provides that a court or a review board conducting a disposition hearing shall assign counsel to act for any otherwise unrepresented accused "(a) who has been found unfit to stand trial; or (b) wherever the interests of justice so require. "Initially, both of these provisions were silent with respect to the burden of payment for the services of counsel. Recent statutory amendments, however, have introduced a scheme similar to that in the *Young Offenders Act*. If legal aid is unavailable to the accused, counsel is to be paid by the Attorney General of the province.⁴⁶

Three sections of the *Criminal Code* confer a discretion on the judiciary to appoint counsel on appeals to a provincial court of appeal (section 684) or to the Supreme Court of Canada (section 694.1), and on summary conviction appeals (section 839) where it is "in the interests of justice" that the accused have legal assistance and the accused lacks the resources to obtain assistance. If the accused is denied assistance by the provincial legal aid program, counsel is to be paid by the Attorney General. In exercising these discretionary powers, the Courts have examined the same range of considerations relevant to the ordering of counsel at trial: the financial circumstances of the accused, the accused's lack of knowledge or skills, the complexity of the case, and the risk of incarceration.⁴⁷

⁴⁵ *S.T.C. v. Alberta* (1993), 140 A.R. 259 (Q.B.); *R. v. T.W.P.*, [1996] O.J. 2668 (Prov. Ct.).

⁴⁶ Bill C-17.

⁴⁷ *R. v. Robinson* (1989), 51 C.C.C. (3d) 452, (Alta. C.A.); *R. v. Baig* (1990), 58 C.C.C. (3d) 156 (B.C.C.A.).

(iii) Conclusion

An examination of the statutory and constitutional requirements for publicly funded representation thus reveals that there are significant legal constraints within which the province must design its legal aid system. The clearest of these constraints, are, however, not likely to be a source of a difficulty. The province is unlikely to wish to deny representation to accused persons in serious and complex criminal cases, or to young offenders or people suffering from mental disorders in the categories of cases covered by the provisions of the *Criminal Code*. On the other hand, the potential for more expansive treatment of the right to counsel under sections 7 and 15 of the *Charter of Rights and Freedoms* suggests that it would be unwise for a province to ignore the need for coverage in various legal domains other than criminal law and thus run the risk of designing legal aid schemes in a manner which may be found unconstitutional.

3. PRIORITY-SETTING IN ONTARIO: THE RECENT EXPERIENCE

Priority-setting in the Ontario legal aid system takes place in two different contexts. With respect to the certificate side of the system, priorities are set by the Legal Aid Committee subject to the approval of the Law Society and its governors. Within the clinic system, priorities are set within, broadly speaking, the “poverty law” envelope at the local-clinic level. Each of the clinics has a community board which typically engages in priority-setting activities on a regular basis. Although we have not studied priority-setting activity in detail in either context, our impression of the recent experience is set out below.

(a) THE CERTIFICATE SIDE OF THE SYSTEM

The certificate side of the system is administered by the Plan under the direction of the Legal Aid Committee. As we have explained elsewhere, the Plan provides a range of services, of which by far the most dominant form is the provision of services by private practitioners on the basis of certificates issued by the Plan. In order to adjust to the funding cap imposed by the Memorandum of Agreement (MOU) entered into with the government in 1994, the Plan imposed a series of service cuts in 1994, 1995, and 1996. The dramatic nature of the cumulative affect of these cuts is encapsulated by one statistic. The Plan currently has budgeted for each of 1996/97 and 1997/98 the issuance of 80,000 certificates. This represents a 150,000 reduction from the 231,383 certificates issued in 1992/93. In order to cope with such a dramatic reduction in the scope of the certificate operations, the Plan imposed, in three stages, a series of service cuts that were intended to reduce very substantially the Plan’s commitment to legal aid services in the non-family civil law context and then to distribute the remaining majority of the necessary reductions more or less evenly across the fields of criminal law, family law, and refugee and immigration law.

In order to accomplish reductions in these three areas, the Plan developed, after considerable consultation, a prioritization of services offered in these fields in order to enable the Plan to focus its certificate issuance on the highest-priority cases. The nature of these service cuts is described elsewhere in this report. For present purposes, a brief discussion of the kinds of priorities that were established will suffice.

In criminal law, for example, prior to 1994, legal aid was available for people charged with both indictable offences and those charged with summary conviction offences such as impaired driving or theft under \$1,000 (now \$5,000). Beginning in 1994, however,

coverage was restricted to cases where the accused faced upon conviction a likelihood of incarceration or loss of employment. From April 1996, coverage was further reduced, with certificates being issued only in cases where the accused faced a likelihood of incarceration.

A similar, although rather more complex, picture emerged in family law. The scheme that was developed for family law identified five levels of priority for family law cases. Given highest priority were those which involved “protecting the safety of a spouse or child who was at risk, or protecting an established parent/child bond (custody/child welfare)⁴⁸”. The second priority included custody variations where there is no emergency, initial applications for access to maintain and establish a parent-child bond, child or spousal support when custody is changed, and so on. The third priority included such matters as support applications and variations involving recipients of public assistance, and custody cases involving mobility rights and relocation where the parent/child bond is not threatened. The fourth priority covered minor custody and access cases, and child protection cases where the issue is access by family members offering to care for the child, and so on. The fifth priority included, for example, adjustments to access by grandparents and other relatives who are not primary caregivers. It was initially assumed that, in 1996/97 the Plan would be able to grant 29,000 family law certificates, and thus be able to provide coverage for matters deemed to have first and second priority. In the event, however, further reductions became necessary, and service delivery was focused exclusively on matters given first priority. The drastic effect of the cutbacks on service delivery in family law led to a recent decision to devote more resources to family law and to attempt to achieve at least some coverage of second-priority matters from April 1, 1997 forward.

In the immigration and refugee area, although the elimination of certificates in immigration matters achieved some savings, the principal reductions in expenditures resulted from a decrease in the legal aid tariff for refugee matters from 29.5 to 16.0 hours, from the virtual elimination of discretionary payments above the tariff, and from a decline in the number of certificates requested as case volumes decreased. Adjustments to the legal aid tariff were also made in the criminal law and family law certificates.

Although some other types of changes were made in the effort to increase the efficiency of the Plan, it would appear that the predominant methods for achieving savings were to reduce the issuance of certificates to cases of perceived highest priority and to reduce, at the same time, the tariff paid on such certificates. In criminal law, priority-setting focused exclusively on the “negative liberty” test. It could be argued that “negative liberty” interests—cases involving domestic violence and child protection cases—albeit coupled with a concern for the welfare of children, dominated priority-setting in family law. Although, at the same time, some expansion was made in the availability of duty counsel, the predominant mode of service cut appears to have been a simple on/off switch. Individuals who would previously have received certificates would typically receive no service or, in some cases, brief access to duty counsel.

⁴⁸ Ontario Legal Aid Plan, *Family Law Update to the Guide for Legal Aid Lawyers*, (July 1996).

(b) THE CLINIC SYSTEM

The clinic system has long operated under the kind of capped funding which was agreed to under the MOU for the certificate side of the system. As a result, the clinics have considerable experience with priority-setting. They have been working with capped budgets on an annual basis throughout their history and have had to adjust their service level and service mix to accommodate fluctuating demand.

As already indicated, the priority-setting activity is undertaken by the local community clinic boards. The process was described in the following terms in a submission to the Review made by a group of community legal clinics:⁴⁹

Boards, with the assistance of staff, meet at least annually to review service priorities. As part of the funding process, the year's activities are reviewed and evaluated in relation to the prior year's priorities, and new priorities are set for the prospective year. Community needs may be assessed and predicted based on a review of demand for services, assessment of changes to legislation or policies, analysis of day to day operations, consultation in the community or knowledge of board members and staff. In addition, informal reviews often occur as current information, including case and summary advice statistics, is available at monthly board meetings.

Boards have generally provided for individual representation on the basis of how directly and immediately the physical well-being of the client, and his or her family, might be affected. This is reflected in the fact that the bulk of the formal advocacy provided by general service clinics in Ontario is in the area of income maintenance and landlord and tenant matters. (In 1996, 56% of new files opened were in the area of income maintenance and landlord/tenant law). The consequences of failing to provide clients with direct service in these areas can be fundamental and immediate - hunger and homelessness. Cases accorded immediate attention include families facing eviction, or obtaining the release of a welfare cheque which is needed to pay rent and buy food. Over the years, therefore, providing direct representation in these kinds of matters has usually been paramount while other needs have had to be addressed in other ways.

Other factors considered by boards in setting priorities may be whether there are other agencies or resources which can meet the need as well, or better than, the clinic or whether the client may be able to meet the need him or herself. This illustrates how important it is that these kinds of decisions are made at the local level by community members who have knowledge of other resources in the community. In some areas, for instance, clinics no longer provide direct representation in Workers' Compensation matters because an Office of the Worker Adviser in their community offers quality specialized representation in such matter. On the other hand some clinics in remote areas of Northern Ontario must meet a much broader range of legal needs than their urban counterparts simply because there are no alternative service providers.

It is not possible to set priorities which will be valid for all communities at all times. Clinics meet the "poverty law" needs of their client communities by observing the following principles:

- Priorities are set at the local level by members of the community with knowledge of the community's unique needs and characteristics.
- Priority-setting is a continuous process which responds to changing needs and characteristics of the community—there cannot be a fixed or absolute set of priorities.

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Ontario Community Legal Clinics, "Access to Justice" (March 31, 1997), a submission the Ontario Legal Aid Review.

- The process of priority-setting must include a consideration of the short and long-term consequences for all persons affected, directly and indirectly.

4. TOWARDS A NEW MODEL FOR PRIORITY-SETTING

Priority-setting for the legal aid system in Ontario under a capped budget will no doubt continue to be a major preoccupation of those charged with management of the system. Although it would be presumptuous of us to suggest that we have mastered the art of priority-setting in legal aid, or identified the ideal recipe for such a process, we do think that some lessons can be drawn from the foregoing analysis and from recent experience in Ontario. In brief, we would suggest that priority-setting for the entire legal aid system should involve, in the future, something of a marriage between the approaches taken in recent years by the two sides of the system. We draw attention to eight themes below.

The Importance of Consultation and Environmental Scanning of Needs. Both the certificate and the clinic side have relied to some extent on consultation processes in their priority-setting. As well, experience in the clinic system demonstrates the importance of attempting to survey the range of client needs through a variety of techniques. Indeed, as we suggested earlier, it may well be that the larger legal aid system can more effectively utilize the clinic system as a window on evolving trends in client needs. No doubt, legal aid administrators and other service providers can also assist in gathering data on needs. In our view, however, the overall legal aid system requires a more systematic and consultative approach to needs assessment and must establish appropriate institutional mechanisms for accomplishing that objective.

The Importance of Responding to a Broad Range of Needs. In a previous chapter we illustrated the broad range of needs for legal services experienced by the traditional consumers of legal aid services. The analysis in this chapter lends support to the view that it is difficult to exclude broad areas of service from the legal aid system on a principled basis. In a legal aid system with capped funding, it is no doubt necessary to target resources to the most deserving cases. Those cases, however, appear to be sprinkled across the domains of law traditionally served by the certificate and clinic sides of the system. The potential for more expansive constitutional treatment of the right to counsel may serve to reinforce this view but need not be considered the driving force for broad coverage.

The Need for Strategic Oversight at the System-Wide Level Coupled with Responsiveness to Local Conditions. The experience of the certificate side illustrates the importance of broad central oversight supported by an adequate information base. Experience within the clinic side suggests the importance of local input, responsiveness to local conditions, and the need to be able to interact with a broad range of service providers within the local community. In combination, this experience suggests that central priority-setting for service delivery should occur at the system-wide level, with some ability to determine the precise service mix at the local level, especially within the field of “poverty law”.

The Limitations of the “Negative Liberty” Test in Setting Service Priorities. The analysis in this chapter suggests that a number of difficulties will arise if too much emphasis is placed on the “negative liberty” test. We believe that a number of these difficulties are manifest in the recent experience with priority-setting on the certificate side of the plan.

More particularly, in both criminal law and family law, the focus on “negative liberty” has left a number of deserving cases with little or no service at all.

The Importance of Integrating Delivery-Model Issues within the Priority-Setting Process. The clinic system has more experience than the certificate side with the integration of delivery-model issues in priority-setting exercises. This is not to suggest that the certificate side has been completely resistant to such considerations. Service delivery in family law, for example, has migrated to some extent from certificates to duty counsel. Nonetheless, the clinic side of the system has been somewhat more creative in developing a range of services and in recognizing that access to the law need not mean, in every case, access to a lawyer or access to full advocacy services. Adopting this view reduces the need to rely upon the “on/off switch” approach and permits an attempt to assess and ameliorate the impact of failure to provide services by developing a broader range of service delivery models. In determining priorities, then, the legal aid system should consider the broad range of possible delivery models in an attempt to adjust type of service to the intensity of a particular need. Priority-setting should thus engage the analytical issues set out in our discussion of delivery models in chapter 7 of this report.

In expanding its capacity to provide informational services of various kinds, however, the legal aid system needs to be astute to avoid becoming a dumping-ground for informational costs that are more appropriately provided by other partners in the justice system, such as the courts-administration function of the Ministry of the Attorney General. Recent experience suggests that there is a risk that reduction in basic service at the courthouse, for example, will impose burdens on duty counsel and on the clinic system to provide information that could more efficiently and appropriately be provided by courthouse staff.

The Importance of Focusing the Priority-Setting Debate on Client Impact. In priority-setting debates with respect to both the provision and the withdrawal of services, we envisage that a combination of the approaches of the certificate side and the clinic side may also be fruitful. The certificate side of the system has focused on trying to identify the most important types of cases at which to target certificate services. The rank-ordering attempted of types of family law cases, for example, is illuminating of client needs. Nonetheless, it represents an attempt to generalize about case types with consequent risk that it is not sufficiently sensitive to the circumstances of the parties to those cases. Matters such as the precariousness of a particular individual’s living circumstances, literacy or communication skills, disability and so on, should be relevant factors in the allocation of limited legal aid resources. In order to meet a broad range of service needs in a capped system, focus on the potential consequences for the individual of failure to provide services seems essential.

The Importance of Using Resources Strategically to Facilitate Access to Law. In some contexts, the most effective means to promote access to law may be to attack a problem systemically. This might involve seeking a change in the behaviour of public officials interpreting their statutory policy or mandate. It might involve seeking change or clarification of a law through discussions with government or litigation strategies such as test cases or class actions. As we indicated earlier, it may well be that the best solution to the burdens of legal assistance imposed by highly complex laws is the simplification of those laws. In setting priorities for service delivery, then, attention must be paid to the possibilities afforded by the strategic use of resources to achieve a maximum impact in

responding to the legal needs of low-income Ontarians. The need for such an approach is intensified by the transition to capped funding.

The Importance of Priority-Setting Being Subject to Revision in Light of Experience in an Evolving Social and Legal Environment. As we have suggested above, it is our view that priority-setting must retain an element of flexibility and must be subject to revision in the light of experience. Priorities will need to be adjusted as the legal aid authority evaluates the evolving legal needs of low-income Ontarians, and the success or lack of success of particular delivery models in meeting particular needs. Priorities will also need be adjusted against the background of changing social and economic conditions and, of course, changes in the legal system giving rise to client needs.

5. RECOMMENDATIONS

In a capped legal aid system, resources should be allocated in accordance with priorities set in light of the following considerations:

- the importance of consultation and environmental scanning of needs;
- the importance of responding to a broad range of needs;
- the need for strategic oversight at the system-wide level, coupled with responsiveness to local conditions;
- the limitations of the “negative liberty” (or risk of incarceration) test in priority-setting;
- the importance of integrating delivery-model issues into the priority-setting process;
- the importance of focusing the priority-setting debate on client impact; and
- the importance of priority-setting being subject to revision in light of experience in an evolving social and legal environment.

THE LEGAL AID SYSTEM IN CONTEXT

A fundamental precept of this report is that the legal aid system must be viewed as part of the broader justice system. In the latter, we include the criminal justice system, the civil justice system, the administrative justice system, and a wide range of legal and regulatory instruments that may be deployed by the state to address existing or incipient legal problems and to pre-empt their escalation into legal conflicts or disputes requiring resolution in a formal adjudicative forum. We have several reasons for viewing the legal aid system as part of the broader justice system. First, while reforms to the legal aid system, including shifts in the mix of delivery models, have some potential for realizing various efficiency gains in the utilization of legal aid resources, our judgment is that these gains are likely to be quite limited relative to those to be realized by improving the efficiency and efficacy of the underlying justice system through appropriate substantive and procedural reforms.

Second, the legal aid system occupies a unique vantage point from which to view the operation of the various elements of the broader justice system. The large volume and wide diversity of problems and clients embraced by the legal aid system provide an opportunity to observe recurring patterns in the functioning (and systemic dysfunctions) of the system, and capped funding of the system provides highly concentrated financial incentives to minimize the cost to the legal aid system by promoting reforms to the underlying justice system that maximize its efficient and effective functioning. No other institution or set of individuals in Ontario, professional or otherwise, possesses, at least potentially, this body of systemic information or this acuteness of incentives. This combination of characteristics ideally equips the legal aid system to play a major role as a proactive change agent. One of the starker shortcomings of the existing legal aid system in Ontario is that it has not assigned a central priority to this role, in part because with an open-ended budget, it has not been motivated to do so, and in part because, given the governance structure of the Legal Aid Plan, there may have been insufficient economic incentives (or even economic disincentives in some cases) to attack and eliminate unnecessary sources of complexity and prolixity in the justice system.

Third, by assigning a central priority to this change-agent role, the new legal aid system would acquire a new legitimacy and rationale with the general body of residents and taxpayers in the province of Ontario beyond its obvious response to needs and rights. Indeed, all Ontarians, including the very large percentage of the population who are unlikely ever to require the services of legal aid, should be able to expect that the legal aid system is mandated in such a fashion that taxpayers can properly view expenditures on legal aid as, in part, an investment in the quality of justice in the province for everyone.

Fourth, the symbiotic relationship between the legal aid system and the broader justice system requires emphasis in another respect: many of the reforms of the broader justice

system noted below, such as alternative measures and diversion in the criminal law system, and case management more generally, can work effectively only if parties are legally represented. In the absence of such a relationship, these reforms are likely to be severely compromised, with adverse consequences for all participants in the justice system.

In the course of our deliberations, numerous proposals for substantive and procedural reform of the broader justice system were brought to our attention, many focusing on particular areas of law. As we lacked the time, resources, and specialized expertise to evaluate these proposals in a detailed or authoritative way, we can only list in summary form, by areas of law, the most prominent and potentially promising proposals that came to our attention; it should be recognized that this list is by no means exhaustive and that inclusion of any proposal on the list is not indication that we endorse it. Rather, the point of listing the proposals is to underscore our strongly held view that the existing justice system should not be taken as a given in redesigning the legal aid system, when a significant amount of legal aid resources goes to subsidize or underwrite existing inefficiencies in the underlying justice system. Instead, the new legal aid system should become a major institutional focus for evaluating ideas that have been advanced in the past, and will be advanced in the future, for substantive and procedural reforms to the broader justice system. These are likely to have a much more dramatic impact on the cost of the legal aid system than any reforms of that system we can propose. They will, in addition, generate pervasive benefits for all Ontarians who come into contact with the justice system. In the remainder of this chapter, we list some of these proposals by area of law and offer our conclusions and recommendations.

1. REFORM OF THE CRIMINAL JUSTICE SYSTEM

Professor Alan Young, in a research paper prepared for the Legal Aid Review,¹ argues that, throughout this century, there has been an increasing reliance on the criminal process to resolve problems. The evolution of new social problems has tended to result in the criminalization of related conduct without consideration of whether the problems could be solved or contained through other methods of state control. In addition, the 1980s witnessed an explosion in court delays, some of which can be attributed to the fact that the *Charter of Rights and Freedoms*² introduced a wider array of new procedural defences. The combination of increased reliance on the criminal process and the entrenchment of procedural rights culminated in the so called *Askov* crisis of the early 1990s.³

The *Askov* crisis and the demands of a constitutionalized process have spawned a series of proposals to effect improvements in case management. Professor Young is skeptical about the efficacy of attempts at case management in Ontario to date, pointing out that the number of court appearances for a guilty plea is almost the same as for a contested trial, and the number of appearances required for the withdrawal of charges is also similar to the number of appearances for trial. Professor Young argues that relatively minor offences

¹ Alan N. Young, "Legal Aid and Criminal Justice in Ontario". See Vol. II, of this report.

² Schedule B to the *Canada Act 1982*, U.K. 1982, c. 11.

³ *R.v. Askov* [1990] 2 S.C.R. 1199.

constitute the majority of all criminal charges which remain within the court system. In Professor Young's view, if charge screening, diversion, and conditional sentencing were to be implemented effectively and administered by the Crown, there would be considerable savings for the legal aid system. Ron Levi, in a research paper prepared for the Legal Aid Review on young offenders, endorses a similar set of proposals in that context.⁴ In 1993, the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (the Martin Committee) advanced a wide range of reform proposals in these areas, some of which have been implemented. Another proposal that Professor Young endorses is repeal of the preliminary-hearing process for indictable offences, provided that an effective pre-trial discovery process is established to replace the discovery function of the preliminary hearing.

In a June 1992 report of the Criminal Law Tariff Review Sub-Committee of the Legal Aid Committee of the Law Society of Upper Canada, a number of more particular proposals were advanced for improving the administration of the criminal justice system. These included improved charge screening, Crown disclosure, alternative measures for young offenders, and expansion of hybrid offences (now implemented, in part, by federal amendments to the *Criminal Code*).⁵

While some of these proposals have been acted on, the Legal Aid Committee of the Law Society of Upper Canada at a meeting on May 7, 1997, adopted a set of proposals that have many similarities to those outlined in the June 1992 report:⁶

1. Pre-trial conferences: Defence counsel are now required to attend in person for pre-trial conferences, when they could be conducted by phone. Defence counsel are using up valuable time on the limited tariff waiting to attend these meetings.

Pre-trial conferences should be set for specific times and conducted by telephone or video teleconference whenever possible.

2. Crown screening: This policy has been in place for three years now and allows Crown attorneys to review charges before an accused person's first appearance. The Crown can then decide which charges to proceed with and which are not worth pursuing, thus saving the accused's lawyer preparation time.

The policy has been successful in reducing legal aid fees paid to lawyers. However, in too many jurisdictions, Crown attorneys are not doing this screening thoroughly, so that too many charges are going forward to court. In some cases, junior Crown attorneys are conducting charge screening and are not experienced enough to make decisions.

Experienced Crown attorneys should conduct charge screening on a consistent basis across the province.

3. Releasing accused persons from jail: Recent changes to the *Criminal Code* of Canada have allowed more accused people to be released directly from the police station by way of an appearance notice, a promise to appear or recognizance, rather than being held overnight for a

⁴ Ron Levi, "The Provision of Legal Aid Services Under the Young Offenders Act". See Vol. III of this report.

⁵ R.S.C. 1985.

⁶ Ontario Legal Aid Plan "Recommended Changes to the Judicial System" (Unreported Report prepared for the Legal Aid Committee, June, 1992).

bail hearing the following day. This policy has been unevenly implemented across the province and has caused added expense to the Plan for unnecessary bail hearings.

Whenever possible, people in jail should be released by way of an appearance notice, a promise to appear or recognizance, and not held for bail hearings, in keeping with the recent Criminal Code amendments.

4. Diversion and alternative measures: These can prevent costly court and trial times, but are being used inconsistently across the province.

Crown attorneys should consider diversion and alternative measures whenever possible.

5. Inexperienced Crown attorneys: Too many inexperienced Crown attorneys are prosecuting large, complex cases. They are not able to identify the real issues of the case, and are therefore less able to settle cases and resolve them out of court. This is costing the Plan money in court time and longer trials.

Experienced Crown attorneys should be assigned to deal with large, complex cases.

6. New provincial court rules: As of January 1998, new Provincial Court rules will be implemented. These may cut into a lawyer's ability to properly represent a legal aid client if the lawyer's time is taken up with extra paperwork, leaving less time on the legal aid tariff to actually represent the client.

Simplify the rules to eliminate as much paperwork as possible.

7. Conspiracy charges: Lawyers are concerned that Crown attorneys are tending to prosecute conspiracy charges rather than substantive charges which might require more or tighter evidence. Conspiracy trials are longer and more expensive.

Crown attorneys should concentrate on prosecuting substantive charges as opposed to conspiracy charges.

8. Fees for disclosure: Due to severe province-wide cutbacks to the court and law enforcement budgets, new fees are applied to more things. Defence counsel are being charged for tapes, transcripts, and photocopying of disclosure materials. This is inappropriate because accused people have a legal right to know what evidence the state intends to use against them.

The policy of charging fees has also been used inconsistently across the province, with little predictability. Many of these charges are being introduced in an ad hoc manner by police. However, they have a real impact on the rights and the accused person, as well as on the costs of the Plan. For example, defence counsel are now being charged to obtain a judge's order allowing a prisoner to be brought to court for a bail review.

Police should not be making their own policies about charging fees for the release of disclosure documents and, generally speaking, should not charge for disclosure. If it is considered desirable to have fees for extra or expensive materials (videotape evidence), the fees should be set after consultation, published, consistent, and adhered to across the province.

9. Subpoenas on northern reserves: The Ontario Provincial Police (OPP) will no longer serve subpoenas on northern reserves, nor will they transport witnesses from remote areas to court. Defence counsel and legal aid are increasingly bearing these costs.

The OPP should serve subpoenas on northern reserves and should provide transportation from remote areas.

10. Use of the media: Crown attorneys are making decisions on cases based on their perception of how the media will react, rather than making decisions based on the merits of the case. This is

resulting in more trials, and Crown attorneys seeking tougher sentences than normal to appease the media.

Crown attorneys should make decisions independently, based solely on the merits of the case, regardless of how the media might react.

11. Inadequate court facilities: Some court facilities make it very difficult for counsel to carry out their duties, and may risk the privacy and safety of those in custody. Very often duty counsel can interview clients only in the dock or in the courtroom.

Duty counsel should be able to interview clients in custody properly, with a reasonable degree of privacy.

Members of the Ontario Court of Appeal and representatives of the Crown Law Office, criminal defence bar, and the Plan have also held recent discussions aimed at streamlining criminal appeals by reducing documentation requirements and tightening scheduling of cases to reduce “double preparation” time. Beyond proposals of this kind, the *Globe and Mail* on June 20, 1997, reported that the Ontario government and two of the province’s chief justices are set to launch a review of every aspect of the provincial criminal justice system with the aim of eliminating costly delays and cumbersome procedures.

2. REFORM OF THE FAMILY LAW JUSTICE SYSTEM

Professors Brenda Cossman and Carol Rogerson, in a case study prepared for the Legal Aid Review, extensively discuss a number of substantive and procedural reforms to family law and policy that may have pre-emptive potential in terms of reducing demands on the legal aid system.⁷ They summarize the conclusions that they reach from this evaluation as follows:

- (i) **Early legal and judicial intervention:** The various initiatives that encourage early legal intervention, and in turn early judicial intervention, offer the most promise for ensuring that family law disputes settle as early, fairly, and inexpensively as possible. Recent initiatives that emphasize this early intervention, such as mandatory informational sessions and case conferences before any motions (except emergencies) can be brought, should be supported and monitored.
- (ii) **Mediation:** Mediation may have an important role in assisting some family law litigants resolve their disputes. But it is not and cannot be a panacea for family law problems and needs. Many family law disputes will require judicial intervention, and cannot be completely diverted away from the court system. When mediation is done properly, with the appropriate legal assistance and protections for vulnerable parties, it is unclear whether it will generate major cost savings.
- (iii) **Case management:** When family law disputes do enter the judicial arena, case management will be an important means of ensuring against delays, and encouraging the parties to settle their disputes within the boundaries established by the case management judge. The early judicial intervention provided by case management will

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See Brenda Cossman and Carol Rogerson, “Case-study in the Provision of Legal Aid: Family Law”. See Vol. III of this report.

be particularly essential for resolving disputes that are higher conflict—that is, where the parties were unable to settle the dispute themselves, and where mediation of the dispute would be inappropriate.

- (iv) **Public legal education:** A greater emphasis on and availability of educational materials, including parenting education seminars and courses, can help individuals with family law disputes understand, negotiate, and ultimately resolve their family law problems.
- (v) **Coordination:** There is a need for much greater coordination within the family law justice system. Various positive initiatives are being pursued in a piecemeal fashion by a host of different actors within the system. These very encouraging initiatives could benefit greatly from coordination within the family law justice system as whole. Greater coordination and integration of the family law justice system would be greatly facilitated by the extension of Unified Family Courts throughout the province. A Unified Family Court—a family court with jurisdiction under both federal and provincial statutes to deal with all aspects of family law—was first established in Hamilton in 1977. The Unified Family Courts in Ontario was extended in 1995. Unified Family Courts are now located in Hamilton, London, Barrie, and Kingston. The provincial Attorney General has recommended the extension of the Unified Family Courts throughout Ontario, and has been seeking the financial support of the federal government for this expansion. In the 1997 federal budget, the federal government announced its intention to support the provinces in establishing and expanding Unified Family Courts. However, the process will take place in stages, which, in the interim, will leave three different classes of family law courts operating in the province.

The ability to deal with all aspects of family law in a single court, along with innovative court procedures, and court-annexed support services has made the Unified Family Courts very successful and effective. Adopting the less formal procedures characteristic of Provincial Courts, with the expanded jurisdiction of the General Division, has made the Unified Family Courts more accessible than the General Division, while providing in one location a more expanded jurisdiction than that of Provincial Court. These highly specialized, one-stop Family Courts avoid the confusion that results from the division of jurisdiction over family law matters between the Provincial Courts and the General Division. Individuals with family law problems need go only to one court, with one set of procedures and one set of forms. Many of the difficulties and confusions of the dual court system (such as choosing the right forum/switching forums as the proceedings develop, and using different procedures and different court forms) are thereby eliminated. Further, these Unified Family Courts have the advantage of being able to use duty counsel, which, within the dual court system, is available only in Provincial Court, and not in the General Division. The Unified Family Court is a more accessible, efficient and sensible court structure for family law. Professors Cossman and Rogerson endorse the views expressed by the Civil Justice Review and the Family Law Working Group, among others, that the Unified Family Court should continue to be expanded across the province as soon as possible.

The Civil Justice Review in its *First Report*⁸ recommended that an information-services video be prepared with respect to family law matters for distribution through community resource centres, shelters, legal aid clinics, courts, and law offices, and also that, except in emergency situations, it be mandatory for parties contemplating family law litigation to view the video prior to instituting court process. The Civil Justice Review also recommended that: an early, streamlined session/evaluation process involving the early intervention of the judge be adopted in the expanded Unified Family Court sites; the Plan consider the development of legal education programs for lawyers providing family law services and make the granting of legal aid certificates to lawyers representing family law clients conditional upon participation in such programs or upon some other form of accreditation; and administrative, low-cost options without judicial involvement be developed for the disposition of purely uncontested divorces. Some of these proposals for a “resolution-focused process” for family law were refined and elaborated in the Civil Justice Review’s *Supplemental and Final Report*.⁹ A Family Law Working Group has been constituted since the release of the Civil Justice Review’s *First Report* for the purpose of developing and implementing the Review’s proposals.

In the June 1992 Report of the Family Law Tariff Review Sub-Committee to the Legal Aid Committee of the Law Society of Upper Canada, a number of proposals were advanced for streamlining the administration of the family law justice system. Many of these proposals were taken up again in a recent report from the Legal Aid Committee of the Law Society of Upper Canada (May 7, 1997):

1. Case management: Case management has saved time and money by bringing the two parties together and eliminating unnecessary court actions. Province-wide implementation, with case-management officers in each court to schedule meetings, would allow the bench more time to conduct these meetings.

Implement case management province-wide and use case-management officers to schedule meetings.

2. Unified Family Courts: Creating unified family courts across the province would simplify legal proceedings, especially in cases where an order is being enforced in one court while needing a variation in another. One court, one set of procedures, and one set of forms would greatly reduce costs.

Create Unified Family Courts province-wide, with one set of procedures and one set of forms.

3. Changes in legislation and other court procedures: The Plan should be consulted by government when new legislation will require extra work and time on the part of lawyers. Likewise the Plan can be a valuable participant in discussions about changes to other court procedures such as the scheduling of motions, motion records, and robing for court.

Consult with the Plan when new requirements and procedures may require lawyers to spend more time.

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Civil Justice Review, *First Report*, (Toronto: Ministry of the Attorney General, March 1995), ch. 16 [hereinafter “*First Report*”].

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Civil Justice Review, *Supplemental and Final Report* (Toronto: Ministry of the Attorney General, November 1996), ch. 7 {hereinafter “*Final Report*”}.

4. Court intake workers and bailiffs: Although eliminating court intake workers and bailiffs may have saved money in one branch of government, it has driven up costs to other branches of government and the Plan since more clients are unrepresented or ill advised. Many times, documents are badly prepared because help at intake is no longer available. This causes delays in the courts, while everyone wastes time and money trying to sort things out. With no bailiffs, instances of fraud have increased, and some clients are being placed in a dangerous situation, having to serve papers themselves.

Maintain court intake workers and bailiffs to assist clients before they reach the courtroom, thereby saving time and money for lawyers, the judiciary, and other court workers.

5. Court filing fees: The fee to file a notice of motion, for example, has recently increased to \$75. This drives up the cost of legal aid.

Roll back higher court fees or provide legal aid with more government funding to cover these costs.

6. Waiting times: Significant amounts of legal aid funds are paid to lawyers who must wait in courtrooms because court appearances are not scheduled sequentially. Court scheduling is ruled by an archaic system which requires that all clients and their lawyers show up at the same time for all court appearances that day. Savings can be achieved by staggering court appearances throughout the day, thereby allowing clients and their lawyers to appear in court with some expectation that their case will be heard without too much delay.

Another example of waste is the motion lists in the General Division, which allow standard civil litigation motions be heard, followed by something completely different such as a landlord-and tenant-trial, followed by family matters at the end of the day, when time permits. By scheduling similar types of motions on the same day, schedules could be more predictable.

Stagger court appearances throughout the day to give lawyers a shorter waiting period in court. Schedule similar motions on the same day, to allow for a more predictable schedule.

7. Awarding costs: Costs should be awarded more frequently in family law matters. They should be assessed on the spot at the end of the motion and ordered to be paid immediately. Allowing the Plan to collect costs directly from the other party, without having to rely on the collection efforts of the legal aid client, would ensure that costs are routinely recovered.

Award costs more frequently and allow the Plan to collect costs directly from the other party, without the help of the client.

3. REFORM OF THE REFUGEE DETERMINATION PROCESS

Professor Audrey Macklin, in a research study prepared for the Legal Aid Review¹⁰ identifies several features of the refugee determination process that impose additional costs on the legal aid system, most notably problems of scheduling and negligible use of the expedited claim process by the Immigration and Refugee Board (IRB) in Toronto.

With respect to scheduling, the standard practice in Ontario is that IRB Members sit in panels of two. They do not sit consistently with the same member or Refugee Hearing Officer (RHO). Lawyers can appear before a different panel every day of the week. Lawyers who appear before the IRB report that delay in hearing a claim is a major

¹⁰ Audrey Macklin, "Report on Immigration and Refugee Law". See Vol. III of this report.

contributor to their costs. The lag time between referral of a claim to the IRB and the date of hearing averages about six to eight months. However, the rate of adjournments and postponements in Toronto is around 40 percent. The situation in Ottawa is, if anything, worse. This means that cases either do not begin or do not finish on the original hearing date. Once adjourned or postponed, the case may take several months to be rescheduled, because it can be difficult to find a date when both members, the RHO, the claimant, and counsel will be available.

The longer the wait for the original hearing, and the longer the interval between postponement or adjournment and resumption, the more time the lawyer must spend with the client reviewing the file, refreshing the client's memory, and preparing the client. If the panel requests additional information or raises a new issue before adjourning a case, the lawyer must invest more time researching and preparing this aspect of the case.

The IRB has experimented in other regions with different methods of organizing and scheduling cases. For example, a system instituted in Montreal appears to have had the effect of significantly reducing the rates of adjournments and postponements in that office. Two panel members and an RHO are paired for a cycle of three months, and assigned a batch of files that are ready to proceed to hearing. An attempt is made to distribute all the files from a given lawyer to a particular panel, so that a given panel works with a limited number of lawyers. The files are reviewed, and the cases are scheduled in accordance with estimates by the panel and counsel regarding how long the hearing will take. As much as possible, all files of a single lawyer will be scheduled back to back. A few days may be left free at the end of the schedule to allow for completion of cases that exceed the allotted time.

The objective of the three-month cycle is to complete all cases that are commenced. Once the three-month cycle begins, if individual cases are not completed in the allotted time, the panel members and counsel may agree to "bump" another of the counsel's cases to complete the one which has commenced, or utilize one of the empty slots to complete the case. The net effect is that cases are begun and finished within the three months. Because of the flexibility in scheduling, cases which are likely to require more than a half-day will be scheduled accordingly. Cases which have to be adjourned due to lack of time will be rescheduled within days or, at most, a few weeks. This diminishes the need for additional preparation time between hearings.

With respect to expedited refugee claims, the IRB, in most regions of the country, utilizes an expedited process for claimants from countries with very high acceptance rates or individual claimants with a profile that suggests a high likelihood of success. Instead of proceeding to a full hearing, expedited claims are determined on the basis of a relatively short (thirty to forty-five-minute) interview with the RHO. However, as of March 1997, the Toronto offices of the IRB have virtually ceased diverting claims to the expedited process, imposing significant additional costs on the legal aid system. In other centres throughout Canada, expedited claims account for between 40 percent and 85 percent of all positive determinations.

In terms of other factors having an impact on cost and delay, in early 1994 the Minister of Citizenship and Immigration announced his intention to amend the *Immigration Act*¹¹ to move from two-member panels to single-member panels in refugee determination cases. Parliament consistently failed to act, and the bill died with the dissolution of Parliament in spring 1977. Obviously, moving from two-member to single-member panels would automatically increase the number of panels available to render decisions. Assuming that more RHOs were hired, the IRB could dramatically cut into its backlog and shorten the lag time between filing of the application and the hearing. Such an initiative could also reduce the requisite preparation time, thereby reducing the Plan's cost of counsel. The reason for the federal government's failure to act on its stated intention in over three years is unclear.

4. REFORM OF THE CIVIL JUSTICE SYSTEM

Reform of the civil justice system in Ontario has recently been the subject of extensive study and two reports by the Civil Justice Review, and a series of background papers undertaken under the auspices of the Ministry of the Attorney General and the Ontario Court of Justice.¹² The Canadian Bar Association has also recently completed a major review of the civil justice system.¹³ A similar review of the British Civil justice system has recently been completed by Lord Woolf.¹⁴ In its *First Report*, the Civil Justice Review developed an extensive set of proposals based on certain central concepts: creation of a unified administration, management and budgetary structure for the court system in Ontario; judicial case-flow management with disposition of cases within predetermined time deadlines from the date of filing; court-connected alternative dispute resolution (ADR); mandatory settlement conferences and trial management conferences; and substantial enhancement of information technology and statistical assistance to improve the management of the civil justice system. In its *Supplemental and Final Report*, the Civil Justice Review recommended mandatory referral of all civil, non-family cases to a three hour mediation session, to be held following the delivery of the first statement of defence with a provision for "opting out" only upon leave of a judge or case-management master, the session to be conducted by a mediator selected by the parties from a list of accredited mediators, or, failing agreement by the parties, by a mediator selected from that list by a judge or case-management master. Other proposals contemplate the creation of an administrative tribunal for the resolution of landlord-and-tenant disputes, which are currently handled by the courts.

In research papers prepared for the Civil Justice Review under the auspices of the Ontario Law Reform Commission,¹⁵ a number of other proposals are developed. Professors

¹¹ R.S.C. 1985, Chap. I-2.

¹² See Civil Justice Review, *First Report*, *supra*, note 8; *Supplemental and Final Reports*, *supra*, note 9; *Study Paper on Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995); *Rethinking Civil Justice: Research Papers for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996).

¹³ Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Toronto: Canadian Bar Association, August, 1996).

¹⁴ Lord Woolf, *Access to Justice*, (London, U.K.: H.M.S.O., June 1995).

¹⁵ See *Rethinking Civil Justice: Research Papers for the Civil Justice Review*, *supra*, note 12.

Robert Howse and Michael Trebilcock, "The Role of the Civil Justice System in the Choice of Governing Instrument", suggest that the civil justice system be viewed as only one instrument available for addressing legal problems. In a wide range of contexts, other legal policy instruments are available to government either to pre-empt disputes or to divert them into other channels. For example, in the case of medical malpractice claims, rather than relying predominantly on the tort system, implementing quality-control and risk-management systems, particularly in institutional settings, where most medical malpractice claims arise, is likely to reduce significantly the incidence of such claims. For remaining claims, an administrative compensation scheme appears to have a number of advantages over the tort system. In the case of civil claims arising out of traffic accidents, the incidence of traffic accidents is likely to be significantly reduced by measures such as raising the drinking age and the driving age; probationary licensing regimes with conditions attached such as limits on the number of passengers than can be carried by recently licensed drivers and curfews on night-time driving; and mandatory installation of passive restraint systems (airbags). With respect to compensatory claims that arise with respect to traffic accidents, diverting these claims out of the courts into some form of administrative (no-fault) compensation system is likely to reduce substantially public and private transaction costs. If merchants are found to be exploiting consumers in particular marketing contexts, then some extension of the cooling-off or cancellation period that already applies to door-to-door sales may provide consumers with an effective, low-cost, self-executing remedy that avoids the private and public costs of pursuing civil claims. With respect to workplace accidents that may give rise to workers' compensation claims, enhanced powers for Joint Worker-Management Safety Committees and more effective regulation of workplace hazards are likely to reduce the incidence of workers' compensation claims. Thus, if data collected by the new legal aid system were to disclose heavy concentrations of claims in particular legal contexts, in addition to options entailing streamlining the processing of these claims through the civil justice system, consideration should be given to other legal and policy options that may pre-empt a significant number of such claims.

Professor Kent Roach, in a research paper for the Civil Justice Review, "Fundamental Reforms to Civil Litigation", develops detailed proposals for: streamlining the pre-trial process, which at present consumes more judicial time than do trials; alternatives to hourly billing, such as contingency fees and fixed litigation budgets; greater disciplinary use of cost rules to penalize for unnecessary motions and procedures; experimentation with user fees to internalize the cost of certain types of litigation to the parties; greater use of applications rather than full actions through the imposition of user fees on actions or the imposition of cost sanctions on actions that could have been decided by way of application; the adoption of a summary trial procedure; and adoption by appellate courts of appropriate procedures for identifying areas of law that need to be clarified in order to increase settlement rates and for consolidating cases that raise these issues.

Professor Iain Ramsay, in another research paper for the Civil Justice Review, "Small Claims Court: A Review", argues that, since the Small Claims Court is the court most often encountered by the ordinary person, it is an important symbol of the legitimacy of the justice system. However, in fact, to an important extent, the Small Claims Court performs the primary function of a debt collection court. Ramsay proposes that: performance standards should be developed for the disposition of small claims cases and that there should be periodic attempts to measure the quality of service provided by the various personnel in

these courts; since individuals are often disadvantaged by current rules which allow organizations to sue in distant venues, actions against individuals should generally be heard in the defendant's own community; there should be greater imagination in the appointment and training of Small Claims Court judges—there is no reason that secondment to this court for two or three years could not be an attractive option for younger members of the bar; it may be possible to generate a differential pricing structure for repeat users (particularly creditors) of Small Claims Court so as to avoid public subsidies to credit provision and collection; experiments with the use of duty counsel in Small Claims Court should be extended (that is, through the use of student lawyers or articling students); and there should be permanent advice centres in larger courts.

Apart from reforms to Small Claims Courts, Ramsay also reviews a number of recent developments in consumer markets involving alternative forms of dispute resolution, including arbitration and mediation operated by industry, ombudspersons, and hybrid industry/government redress mechanisms. Examples in Ontario and elsewhere include arbitration plans in the automobile and new-home industry, a compensation scheme in the travel industry and ombudspersons in the financial-services industry. These informal consumer redress mechanisms seem to have a mixed record, at least as measured by surveys of participant satisfaction. Clearer standards or bright-line rules, improved appointment and other process requirements to ensure a fairer adjudication process, and adequate publicity of patterns of unacceptable practices are likely to enhance the effectiveness of these regimes.

Margot Priest, in another research paper prepared for the Civil Justice Review, "Fundamental Reforms to the Ontario Administrative Justice System", addresses the large role played by the administrative justice system in the day-to-day lives of the residents of Ontario, whether measured by the number of regulatory agencies that adjudicate rights and entitlements between individuals or between individuals and the state, or the cost of the administrative system, or the number and range of decisions made by agencies within the system. Priest develops proposals that would treat the administrative justice system as a single system: administrative agencies must have adequate case-management techniques, including methods of identifying major or urgent cases; administrative agencies should be encouraged to use generic policy proceedings and be granted rule-making powers to be exercised through a public consultation process; administrative agencies should publish annual statements of priorities in consultation with affected groups, the minister, and administrative officials; agencies should be encouraged to continue the use of and experimentation with alternative dispute resolution techniques; appeals from decisions of administrative agencies to the courts should be eliminated or curtailed, leaving judicial review for procedural irregularities as the principal form of judicial supervision of the administrative justice system; an Ontario Administrative Justice System Council should be established to deal with such matters as discipline, investigation of complaints, performance appraisals, training, and ongoing policy and research on administrative justice; the process of appointments to administrative agencies should be depoliticized with the creation of a body modelled on the Ontario Judicial Appointments Advisory Committee; and rationalization initiatives, such as more extensive use of cross-appointments, and the merger or co-location of families of agencies with similar missions should be encouraged.

5. CONCLUSIONS

This sampling of proposals for substantive and procedural reforms of the criminal, civil, and administrative justice systems suggests that, while public resources for the administration of these systems and the legal aid system may be scarce, ideas for improving their performance are not. Moreover, substantial consensus appears to exist with respect to a number of these ideas. However, the criminal, civil, and administrative justice systems are large, sprawling, and unwieldy, and are weakly coordinated and often afflicted with vested interests in the *status quo*, and ingrained habits of thinking and acting that inhibit serious systemic change. In addition, two levels of government must often agree before there can be changes to these systems, given significant federal jurisdictional involvement in criminal law, family law, and immigration law. In the past, reform efforts have been too episodic and cataclysmic in character, typically precipitated by perceived crises in these systems (such as “out-of-control” court back-logs). However, effective reform efforts require a continuous focus on incremental or marginal changes through ongoing design, experimentation, implementation, and evaluation exercises. Widely representative institutionalized change agents are required to move these systems in more productive directions. As the Civil Justice Review recommended, a widely representative, unified administrative, management, and budgetary structure for the court system in Ontario may provide a desirable institutional focus and impetus for reforms to the court system. As Margot Priest argues, a similar structure may be required for the administrative justice system. An important complement to these structures would be a proactive legal aid system which is assigned, as one of its major priorities, identification of systemic dysfunctions or deficiencies in the justice system; develops, evaluates, and publicizes reform proposals; and acts as an institutional advocate to the legal profession, the judiciary, the public, and governments in developing support for systemic reforms. This role for the new legal aid system would become even more important if these other institutional foci do not materialize.

6. RECOMMENDATIONS

1. The legislative mandate for the legal aid system should assign a high priority to its role as a proactive change agent in researching, developing, publicizing, and promoting substantive and procedural reforms to the broader justice system; in turn, the system should develop the necessary human-resource capabilities (internal and external) to play this role effectively.
2. The chief executive officer of the legal aid authority should develop close institutional linkages with other partners in the justice system including the governance bodies of any new unified administrative agency for the courts and any unified administrative justice system agency that might be created.
3. The Ontario legal aid authority, either alone or, preferably, in concert with other provincial legal aid agencies, should develop reform proposals that require federal cooperation, and apply pressure on the federal government to be responsive to these reform proposals (rather than externalizing the costs of any existing inefficient federal proceedings onto provincial legal aid plans).

THE CHOICE OF DELIVERY MODELS FOR LEGAL AID

No single issue in the history of legal aid, both in Ontario and elsewhere, has inspired as much intense debate as the choice of delivery models for legally aided services. Much of this debate in the past has focused on the advantages and disadvantages of a pure judicare model and those of a pure staff model. These differences in viewpoints are reflected in the equally divergent approaches of these delivery models. In terms of the allocation of legal aid resources within Canada, Ontario, Alberta, and New Brunswick utilize predominantly the judicare model, whereas Prince Edward Island, Nova Scotia, and Saskatchewan rely predominantly on the staff model. Quebec, Manitoba, British Columbia, the Northwest Territories, and the Yukon have adopted a mixed model, with major judicare and staff elements. In jurisdictions beyond Canada, similar divergences in choice of models are also observable.¹

Until recently, many of the debates surrounding the choice of delivery models were absolutist in character. Proponents of one model viewed it as superior to the other model in almost all circumstances. These claims and counter-claims were grounded on both ideological and empirical considerations. Proponents of the judicare model argued that a private, decentralized bar guaranteed clients maximum freedom to choose their counsel; ensured that the principal loyalty of the lawyer was to his or her client, whose interest would be defended or advanced as vigorously as would that of a private fee-paying client; and, in combination with vesting of the governance of the Legal Aid Plan in the profession itself, ensured maximum independence from state interference or influence, particularly in cases where the state was directly implicated as a party (*e.g.*, criminal prosecutions, child protection cases, immigration cases, and state benefit or entitlement claims).

In contrast, proponents of a pure staff model, in which lawyers and support staff are hired directly by the legal aid administration, argued that it was less costly than its judicare counterpart because of economies of scale and specialization, particularly in processing high-volume, more routine cases; was likely to yield more consistent quality of service; and could be made more accessible to clients through location of Staff Offices in client communities. Proponents of the community legal clinic version of the staff model, in which staff are hired by each clinic and are accountable to a community-elected board responsible for the clinic's governance, claimed that a less radically individualistic and more communitarian approach to the delivery of legal aid services was superior to the judicare model—first, in being responsive to the priorities and concerns of the community in which these offices were located and, by

¹ See David Crerar, "A Cross-Jurisdictional Study of Legal Aid: Governance, Coverage, Eligibility, Financing, and Delivery in Canada, England and Wales, Australia, New Zealand, and the United States", a background paper prepared for the Ontario Legal Aid Review, Vol. III, this report.

which, to a greater or lesser extent, the offices were governed; second, in being more proactive in undertaking community outreach and sensitizing disadvantaged and often ill-informed citizens of their legal rights, and assisting them to take active steps to enforce them; and third, in promoting and advancing law-reform initiatives and test-case litigation designed to address systemic deficiencies in the law, to which an uncoordinated, decentralized legal-service delivery model (such as judicare) was unlikely to assign a significant priority.²

At the empirical level, proponents of the two models (three, if community clinics are viewed as significantly distinct from the pure staff model) typically made sharply contrasting claims on behalf of their preferred model, based to a large extent on anecdotal evidence and intuition, and to a lesser extent on systematic empirical data relating to the relative performance characteristics of the two models in terms of cost, quality, accessibility, and social impact.

As Susan Charendoff, Mark Leach, and Tamara Levy note in their research paper prepared for the Legal Aid Review,³ more recently the discussion about the preferable legal aid model has refocused on a more productive set of issues:

There is now a growing consensus among commentators on legal aid that defining the right array of service components—varying with type of law, client need, case priorities, type of service being offered (e.g., bail hearing as opposed to a jury trial), or the collective characteristics of the needs of certain groups of clients, such as Aboriginal people or the physically, or mentally handicapped—is far more useful.

With this reconceptualization of the issues, it has also become clear that the choice of delivery models is not a simple binary one between the judicare and staff models. For example, on the judicare side, important choices must be made about the structure of the judicare tariff, for example, hourly rates, fixed fees per case, maximum hours per case, and graduated rates reflecting greater levels of experience or expertise. In addition, contracting-out to private law firms or private counsel through a competitive tendering process of blocks of cases for fixed fees per case or a total sum for the block is an option that has begun to be explored seriously, and indeed experimented with, in other jurisdictions in various, although limited, contexts. On the staff-model side, there is a need to differentiate between delivery modalities where the legal and support staff are employed directly by the Plan, and community legal clinics which are independently incorporated as non-profit organizations with their own community governance structure and which employ their own staff and pursue their own mandate. Within the community legal clinic model, which is more strongly developed in Ontario than in any other jurisdiction, most clinics are all-purpose, providing a broad array of legal and related services in the general domain of “poverty law”, for example, income maintenance, including employment insurance, Canada Pensions, workers’ compensation, welfare and family benefits; work-related issues, including employment standards, occupational health and safety, wrongful dismissal; housing problems; and consumer and debt problems. However, other community legal clinics have a much more specialized focus and cater to the legal needs of particular constituencies, for example, children and youth; the

² See Janet Mosher, “Poverty Law—A Case Study”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

³ See Susan Charendoff, Mark Leach and Tamara Levy, “Legal Aid Delivery Models”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

mentally and physically handicapped; Aboriginal people; the African-Canadian community; injured workers; and environmental concerns. Some direct staff models provide a full array of legal services within a defined legal domain (*e.g.*, criminal law), while others involve counsel only providing summary advice or handling preliminary proceedings (as in a duty counsel model). Within a duty counsel model, duty counsel could be full-time employees of the Plan or could be retained from the private bar on a per-hour, per-diem, per-week, or some other basis.

In mixed models, the systems' different delivery methods may, in some respects, be complementary to one another and, in other respects, competitive with one another. For example, community legal clinics largely offer "poverty law" services that, for economic reasons, the private bar has little interest in providing and that, in many cases, are not suitable for discrete assignment to private counsel under a judicare system. Where a client at a clinic requires major criminal or family law services, clinics can, and commonly do refer the client to a judicare lawyer. Similarly, duty counsel handling predominantly first appearances and adjournments in criminal proceedings, and providing summary advice to individuals, in many cases deliver services that are complementary to those of private counsel who may subsequently assume carriage of the matter under a legal aid certificate. A Staff Office handling refugee and other immigration matters and employing specialized paralegal staff with close acquaintance with the countries from which immigrants have arrived may have the capacity to undertake country-specific research that can be shared with private counsel acting for refugees or immigrants in subsequent proceedings, thus minimizing the need for duplicative, and perhaps less expert, research.

On the other hand, in mixed systems, different delivery models may directly compete with one another. This is true of the staff models in Quebec, Manitoba, and British Columbia, where clients have a choice between using a lawyer employed in a Staff Office and using private counsel under a legal aid certificate. For obvious reasons, debates over choice of delivery models tend to be intensified to the extent that these models compete with rather than complement one another. As in most walks of life, whatever virtues one might attach in the abstract to competition at either the systemic or the individual-provider level, when one's own economic self-interest is threatened by the prospect of such competition it is easy to be persuaded that competition works better in other areas of economic life than in the context at hand.

These preliminary observations lead us to the general orientation for this chapter, which comprise three basic elements. First, the Ontario legal aid system in the future should adopt, explore, and experiment with a much richer array of delivery systems than those that have characterized the system to date. While it is often claimed that the Ontario legal aid system is mixed because of the co-existence of the judicare and clinic systems, in fact 80 to 85 percent of the resources of the Plan are devoted to the judicare system and only about 10 percent of the Plan's resources to the clinic system. In terms of direct staff models, they receive a minuscule percentage of the Plan's resources (primarily duty counsel programs in selected criminal and family law courts), and no attempt has been made to experiment with contracting-out blocks of cases.

The second element in our general orientation, which we do not develop at length in this chapter but do so in chapter 15, is that, in the future, a governance structure is required for the legal aid system that renders it amenable to open-minded, highly motivated, and innovative utilization and exploration of a rich array of delivery models, and systematic and objective

periodic evaluations of their performance. Obviously, such evaluations (which should be undertaken by independent review and made public) should employ a settled and well-defined set of predetermined criteria reflecting performance objectives, including cost, quality of service, accessibility, and social impact.

The third element in our general orientation—performance evaluation and quality assurance—should be assigned a much more prominent role in Ontario's future legal aid system than has been in the case in the past. While comparing the costs of different delivery models (e.g., cost per case) has proven an intractable task, given problems of standardizing or otherwise taking account of differences in the nature of case-loads, problems of evaluating relative quality performance under different models has proven even more intractable, given the much more subjective, context specific, and non-observable dimensions of quality that are often—probably typically—involved. Relatedly, beyond simply measuring or evaluating relative quality of service, as we argue more fully below, serious efforts need to be undertaken to ensure base-line levels of quality assurance in the judicare system, the community legal clinic system, the direct Staff Offices that we recommend be created, and in any experiments with block contracting. Without such efforts to minimize the often wide variability that currently exists in the quality of legal services provided under the Plan, the interests of clients are not well served and the taxpayers of Ontario are not getting full value for their money.

In section 1 of this chapter, we briefly review the existing empirical research on relative performance characteristics of alternative delivery models. In section 2, we analyze from an economic perspective the markets for legal services in general, and the market for legally aided legal services in particular, focusing on systemic factors under different delivery models that are likely to affect two key performance variables: (a) supplier-induced demand; and (b) quality decline. In the light of this analysis, we propose in section 3 a series of quality-assurance measures designed to mitigate these tendencies. In section 4, we offer our conclusions and, in section 5, summarize the recommendations developed in this chapter.

1. EMPIRICAL RESEARCH ON DELIVERY MODELS⁴

A handful of comparative studies in Canada and the United States have attempted a systematic evaluation of the relative performance of various legal aid delivery models. These have been extensively reviewed in earlier studies, and in a research paper prepared by Susan Charendoff, Mark Leach, and Tamara Levy for this Review.⁵ We do not reiterate the details of these studies here. The most striking finding from most of the studies is that no one delivery model exhibits performance characteristics that are systematically superior to those of other delivery models in all contexts. We review the empirical evidence briefly under specific performance characteristics.

⁴ This section of the paper draws extensively on a background paper prepared by Charendoff, *et al.*, *supra*, note 3.

⁵ See Canadian Bar Association, *Legal Aid Delivery Models: A Discussion Paper* (Toronto: Canadian Bar Association, 1987); Frederick Zemans and Patrick Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (North York, Ont.: Osgoode Hall Law School, York University Centre for Public Law and Public Policy, 1997); Charendoff, *et al.*, *ibid.*

(a) COSTS

Measuring the costs of different legal aid delivery models is often problematic because of the number of variables involved. *Indigent Defenders*, a study sponsored by the U.S. National Center for State Courts, described this dilemma well:

Efforts to arrive at a meaningful cost comparison across courts or on a cost per case basis are fraught with difficulties, uncertainties and hazards. Continued research along these lines, in fact, is of questionable value because of a lack of a relevant standard against which cost-per-case can be judged.⁶

Other factors, such as the differing referral patterns, the client's freedom to choose counsel, and the size and structure of the tariff, add to the difficulty of comparing costs across jurisdictions.

Many of the Canadian, single-jurisdiction, federal/provincial legal aid studies undertaken in provinces that use a staff model conclude that that model is the less expensive delivery mode.⁷ However, most of the controlled, comparative studies completed in both Canada and the United States conclude that there is no significant difference in cost between a staff and a judicare mode of delivery.⁸

Despite these contradictory findings, several studies argue that the staff model should have one significant advantage over the judicare model in terms of costs. This difference is the result of a staff lawyer's ability to specialize in legal aid cases. Generally, lawyers who accept legal aid certificates also have paying clients; there are relatively few whose practice is made up exclusively of legal aid case work.

Staff lawyers, at least in the field of criminal law, spend each day dealing only with legal aid cases and, in the course of doing so, often develop close relationships with the Crown Attorneys in their area.⁹ As a result of this close relationship, staff counsel are more successful plea bargainers.¹⁰ The Burnaby, British Columbia, study found that, although the rate of guilty outcomes was essentially the same for judicare and staff clients, clients of the Staff Office who were charged with only one offence (which represented about half the sample) went to jail less often than did single-charge judicare clients.¹¹ For the clients with multiple charges, jail results

⁶ See U.S. National Centre for State Courts, *Indigent Defenders: Get the Job Well Done and Done Well* (May 1992) [hereinafter "Indigent Defenders"].

⁷ See Department of Justice, *National Review of Legal Aid* (Ottawa: Department of Justice, 1994) [hereinafter "NRLA"].

⁸ Patricia L. Brantingham, *The Burnaby, British Columbia Experimental Public Defenders Project: An Evaluation Report* (Ottawa: Department of Justice, 1981) at 198 [hereinafter "Burnaby Report"].

⁹ S. Linden and J.D. Ewart, "Background Paper on the Implications of the Salaried Defender Concept for the Delivery of Criminal Legal Aid" (Toronto: Ministry of the Attorney General, 1978) at 19.

¹⁰ See *NRLA*, *supra*, note 7, at 15 and *Burnaby Report*, *supra*, note 8, at 8.

¹¹ *Burnaby Report*, *ibid.*, at 9.

were similar.¹² The ability of staff counsel to negotiate with the Crowns at an early stage in the proceedings can lead to a more rapid disposal of cases.¹³ Although this may not always be the result, the cost savings achieved through specialization is frequently held to be one of the benefits of the staff model. The perceived benefits of the staff model's ability to specialize are discussed further below.

If close relationships are relevant, however, it may be that judicare lawyers whose practice is devoted to criminal law would produce the same benefits. On that basis, the appropriate comparison would not be between staff lawyers and judicare lawyers, but between staff and judicare lawyers who specialize in criminal law, and judicare lawyers whose practice is a mix of criminal and other matters. There may be further subcategories, because in smaller communities many lawyers are considered criminal specialists and possess solid, professional relationships with Crown Attorneys when only a portion of their practice is devoted to criminal law. Thus, it may not be the mode of payment that matters, by the year or by the case, but the concentration of a lawyer's practice.

Another conceivable ground for cost differentials flows from the way that cases are assigned to staff lawyers, based on the assumption that the public defender will "staff" a specific courtroom, act as duty counsel as well as representing individuals, develop a rapport with the Crown Attorney and judge, and thereby become a part of the administration of the criminal court. But even this cost difference would flow from the way staff are assigned work rather than the way they are paid. On the other hand, this may well not be true for the more serious and expensive cases, where there would have to be some choice of counsel, or the counsel assigned would have to follow the case to whatever court it goes.

It is worth stressing that the *Burnaby Report*, which compared a staff criminal law office and judicare, dealt only with the most routine criminal cases in which volume might be expected to produce cost savings (though, in fact, it did not). In Ontario's recent legal aid cost-control plan, implemented on April 2, 1996, legal aid for the low-end, more straightforward cases was reduced. Now a greater proportion of the criminal legal aid case-load than before is made up of high-end, more complex cases.

Of course, there are places in which the demand for legal aid is insufficient to sustain full-time staff. In small, rural, or remote communities, a judicare capacity may always prove to be less costly.

A further issue relating to the cost of delivery models is predictability. From the legal aid administrator's perspective, a staff model may be easier to manage because a set number of lawyers can be hired at set salaries, and a budget can be devised accordingly. However, this possibility leads to the concern that when cuts to government spending are made or when demand for legal aid increases, no new staff counsel will be hired, case-loads will increase, and the quality of representation will suffer. It is important to recognize that cuts to legal aid spending may have dramatic effects on service delivery regardless of the model in place;

¹² Based on this finding, the *Burnaby Report*, *ibid.*, went on to conclude that, for every single-charge case handled by judicare counsel, correctional costs could be \$200 higher than if the same case were handled by staff counsel. However, it is important to note that this cost differential may be smaller when the increased probation costs for clients who did not receive custodial sentences are factored in.

¹³ See *NRLA*, *supra*, note 7, at 157.

clients will either get poor service (if staff or judicare case-loads rise to unmanageable levels) or no service (if tariffs are reduced to a level which causes too few private lawyers to accept certificates or if the number of certificates is reduced).

Finally, the complexity of attempting to assess accurately the costs of one legal aid delivery model relative to another, not to say the incidence of disagreement among evaluators regarding the results, may lead one to consider whether there is a more productive basis for measuring the appropriate and necessary level of expenditures on legal aid. One option for evaluating criminal legal aid would be to measure the relative costs of state-funded defence work and those allocated to state-funded prosecutions. This is the approach taken in the U.S. National Center for State Courts study.¹⁴ Its methodology demonstrated across nine sites that legal aid matched up reasonably well in terms of compensation, but that prosecutors had significantly greater access to investigators and expert witnesses. This finding might be the basis for a more balanced and more practical evaluation of criminal legal aid costs than has been attempted previously in Canada.

(b) QUALITY OF REPRESENTATION

Generally, the findings of the comparative studies demonstrate that there is little difference in the quality of services delivered by the different models. However, as is the case with costs, qualitative evaluations of delivery models are extremely difficult to conduct. There are many variables to control for. First, there is the difficulty of determining from whose perspective quality will be measured—that of the client, other lawyers, judges, legal aid managers, government, or funder. Even within those groups there may be variation in opinion as to whether a lawyer provided a good service for his or her client.

The second difficulty is determining which elements of service will be used to measure quality. Included in the list of options might be time spent per case, case outcome, whether or not the client received a custodial sentence, the sophistication of legal research and argument, the impact of the lawyer's work on the community as a whole, or how satisfied the client was with the lawyer's service. Each of these measurements has been used in one study or another, but the lack of consistency and the numerous variables make any conclusions regarding the quality of a particular delivery model questionable. That said, the results documented below do reveal some indication of the quality of service afforded by different delivery models. However, these results cannot be taken as conclusive.

One point worth making is that staff programs, as compared with judicare models, have the greater potential for quality-control. Since the majority of lawyers who participate in judicare schemes do so on a part-time basis, and thus the numbers are large (5,000 to 6,000 throughout Ontario), establishing and enforcing standards of quality can be difficult task. The more structured, employment-based operations of Staff Offices, on the other hand, lend themselves to case assignment based on experience, supervision, performance review, training programs, and client feedback.

(i) Case Outcome

Case outcome does not necessarily reflect quality of service, but is one of the most common forms of measurement. It is interesting to note the general patterns that have emerged

¹⁴ See *Indigent Defenders*, *supra*, note 6, at 65.

in studies to date. Almost all studies conclude that, although the rate of guilty findings is the same for both staff and judicare clients, staff counsel enter more guilty pleas at an early stage in the proceedings, and staff clients have lower incarceration rates.¹⁵ However, the *Burnaby Report* found that judicare clients received significantly more absolute discharges.¹⁶

(ii) Continuity of Representation

An important aspect of legal representation is continuity. Once a client obtains a lawyer, the possibility that the solicitor-client relationship may end at any given point is no greater in a judicare model than in a staff model. However, the point at which the solicitor-client relationship may begin is likely to be earlier in a staff model. The experience of both the *Burnaby Report* and the *Alberta Youth Offices Evaluation* was that staff counsel made earlier contact with clients, often first meeting them in a duty counsel role and then working with them through disposition. Similarly, the *Burnaby Report* found that staff counsel remained with their clients through different stages of the proceeding more often than did judicare counsel.¹⁷

(iii) Specialization

One of the arguments frequently made in studies of legal aid delivery models is the perceived greater ability of staff counsel to specialize in a particular field of law. Clearly, if staff counsel spend all of their time doing legal aid case work, they will develop an expertise in this type of work. Crime may have “poverty law” aspects that permit a lawyer’s specialized expertise to produce benefits for the client and for the system. Examples of such benefits include representation on bail reviews or knowledge of and access to community supports for non-custodial dispositions. Those benefits may be seen more clearly from the needs perspective of an alleged young offender than from that of an adult accused, given the greater diversity of resolution options and community supports available for youth.

In Manitoba, the three Winnipeg Staff Offices specialize in different areas of law: one specializes in criminal work, the second focuses on prison law and immigration cases, and the last does only “youth work”—young offender and child welfare cases. One purpose of this focus is to enhance the quality of service through specialization. Only a handful of private lawyers see the same number of legal aid clients annually.¹⁸ Again, it is worth emphasizing, as discussed earlier, that a private bar criminal defence lawyer with a mixed, private/legal aid practice might produce the same results because of his or her specialization in criminal law.

Moreover, the impact of specialization may not be as great in criminal matters as in family legal aid, where the whole dynamic changes when the client has a low-income. Purely family legal issues often form only one aspect of the shelter, health, educational, employment, safety, and social assistance issues which confront women, in particular, who seek redress

¹⁵ See *Burnaby Study*, *supra*, note 8, at 8; Ministry of the Attorney General (B.C.), *Legal Aid Models: A Comparison of Judicare and Staff Systems* (Victoria, B.C.: Ministry of the Attorney General, November 1991), in Timothy Agg, *Review of Legal Services in British Columbia* (Victoria, B.C.: Ministry of the Attorney General, August 1992) at 128; *NRLA*, *supra*, note 7, at 158; *Alberta Youth Offices Evaluation* (Edmonton, Alta.: August 1996) at 19 and 21.

¹⁶ See *Burnaby Report*, *supra*, note 8, at 9.

¹⁷ *Ibid.*, at 7.

¹⁸ *Ibid.*, at 3.

within the legal system. Family law specialization may therefore be of vital importance to the quality of legal aid services.

In measuring staff and judicare models against time spent per case, the *Burnaby Study* found that one advantage staff counsel have over judicare counsel is the ability to achieve economies of scale and save travelling time.¹⁹ Other studies have suggested that lawyers from Staff Offices in a given community spend less time travelling between their offices and court because they are often able to handle more than one case per attendance at court. Another reason for underlying differences in time spent per case may be that staff duty counsel are able to negotiate more settlements than are judicare counsel, leading to fewer trials.²⁰ The clearance rates demonstrated by staff duty counsel in the young offenders offices in Edmonton and Calgary also offer evidence of early resolution capacity. As was discussed above, this may be the result of staff counsel's ability to develop a better rapport with Crown Attorneys as a result of staff's regular attendance in the same court. On the other hand, critics may argue that excessively close rapport creates the danger that defence counsel's vigour and independence may be compromised.

It should also be noted that the measurement of time spent per case may be skewed by the way in which an evaluation is conducted. For example, if time spent per case for the judicare model is measured by the number of hours billed to legal aid, the results may not be entirely accurate. *Patterns in Legal Aid 1994*²¹ reported that two provincial studies and one federal study of legal aid programs in three provinces found that judicare lawyers typically bill for the maximum allowable hours for each type of case.²² This finding could be interpreted to reflect either that judicare lawyers do spend more time per case or that their billing practices overstate the number of hours spent per case (particularly if tariffs are low).

(iv) Case-loads

The most frequently voiced concern about a staff model of legal aid delivery is that it is less flexible, and therefore more vulnerable to heavy case-loads, than are other delivery models. The concern is that counsel will be able to spend less time per case, and quality of service will suffer.²³ There is an assumption underlying this concern which should be examined closely—namely, that less time spent per case necessarily means that the client is receiving an inferior service. This may not always be true; it may simply be that a staff delivery system is more efficient in certain areas of practice than are other models of delivery. Client evaluations have shown that, even where Staff Office case-loads are high, more guilty pleas are entered, and less time is spent on each case, clients still seem to be satisfied with the quality of service delivered.²⁴

¹⁹ See *ibid.*, at 9.

²⁰ See *NRLA, supra*, note 7, at 157.

²¹ Department of Justice, *Patterns in Legal Aid* (Ottawa: Department of Justice, 1994) [hereinafter "Patterns"].

²² See *NRLA, supra*, note 7, at 157.

²³ Law Society of Upper Canada, *Legal Aid on Trial: A Submission to the Government of Ontario* (Toronto: Law Society of Upper Canada, 1991) at 9.

²⁴ See *Burnaby Report, supra*, note 8, at 10, and *Patterns, supra*, note 21, at 38.

A related issue is that, considering the case-load of the legal aid system as a whole, a judicare model may be perceived to more easily adjust to increasing demand for service than a staff system. Some argue that, in a judicare model, increased demand is easily absorbed by the legal community because there are enough lawyers to take on the work, whereas in a staff system adding lawyers to an office or opening another Staff Office is operationally more onerous. This argument is not wholly persuasive. In both situations, whether or not the system can absorb increased demand will depend on how much funding is available for legal aid delivery. In each system, if funding is available, more lawyers could be paid to do the required work. Meeting an increased demand for legal aid services is predominantly a question of resources, not of choice of delivery model. In this respect, one advantage of a mixed model of legal aid delivery is that legal aid administrators could mandate that, when staff case-loads reach a certain level, cases must be referred to the private bar by administrators.

(v) Impact on the Poverty Community

“Impact work” can be defined as work which not only helps clients to improve their current legal situation, but aims to help prevent that situation from recurring by educating clients about their rights and responsibilities. The U.S. *Delivery Systems Study*²⁵ defined impact work as “a project’s achieved or expected results in terms of long-lasting improvement or avoidance of deterioration in the living conditions of significant segments of the eligible population”.²⁶

The extent to which one believes that the impact of a legal aid delivery model is a qualitative issue depends, in part, on one’s general view of the purposes and goals of legal aid. If one believes that part of the purpose of legal aid services is to help to educate clients about the legal system and the laws that affect them, then the ability of a particular delivery model to achieve this end is relevant to the quality of service being provided. On the other hand, if one believes that the purpose of legal aid is only to provide legal services to the poor on a case-by-case basis in the same way as they would be provided to paying clients, “impact on the community” may not have much to do with quality of service.

In the United States, the impact on the poverty community was the only criterion under which the various models were found to have significantly different results. The highest impact rating was achieved by the existing staff system. The lowest impact rating was given to a pure judicare model.²⁷ Generally, staff, and particularly clinic, systems are better positioned to carry out impact work.²⁸ This type of work can be done through the use of staff paralegals, community legal workers, or social workers, or by locating the Staff Office in proximity to low-income client groups. Judicare lawyers are not compensated for this type of work, and therefore tend to restrict themselves to more traditional legal work. Private-bar lawyers do

²⁵ U.S. Legal Services Corporation, *The Delivery Systems Study* (Washington, D.C.: U.S. Legal Services Corporation, 1980).

²⁶ Jeremy Cooper, “The Delivery Systems Study: A Policy Report to the Congress and the President of the United States” (1981), 44 Mod. L. Rev. 308 at 316.

²⁷ See *ibid.*, at 317.

²⁸ See National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Department of Justice, 1995) at 61.

little to help raise client's awareness of their legal problems.²⁹ The *Review of Legal Services in British Columbia* suggested that a general consensus exists that private-bar lawyers had difficulty understanding issues of poverty, race, and gender.³⁰ However, it has to be remembered that a great deal of impact work is carried out by members of the private bar either individually or through lawyer organizations such as the National Association of Women and the Law and the Criminal Lawyers' Association.

(c) ACCESS TO LEGAL SERVICES

In its broadest sense, the phrase "access to legal services" could be interpreted to mean access to a legal aid delivery model that meets every legal need with full service. In the extreme, implementing anything less than the full range of legal aid delivery models could be seen as limiting client access. Given the limits to government funding for legal aid, the possibility that this full range of delivery systems can be implemented is unrealistic. The challenge is to find the mode of delivery that is most appropriate for particular communities of consumers or for particular areas of law. Increased use of paralegals, diversion, mediation, law students, and self-help mechanisms could go some way to increase people's "access" to legal services.

Each of the basic models of legal aid delivery has strengths and weaknesses which make it more or less appropriate for serving different client communities and different classes of legal problems. Some of the strengths and weakness of different delivery models with respect to access are set out below.

(i) Judicare

Although in some respects the judicare model may seem to be the most accessible to clients because it provides them with a wide range of choice in obtaining counsel, the judicare model has some practical drawbacks in serving legal aid clients.

First, the tariff rate will have a significant effect on the quality and experience level of counsel who will accept legal aid certificates. If tariff rates are low, the choice available to legal aid clients may become limited if more experienced, specialist counsel refuse to participate in legal aid or, even if registered on a legal aid panel, turn down many cases.

In addition, client access to lawyers in a judicare model stems, not from what the system is able to provide for the client, but from how the client perceives the service provided. The judicare model is based on the principle that legal services should be available to low-income clients in the same way that they are available to those who can afford them. This premise is based on a questionable assumption, that legal aid clients need the same type of lawyer and same type of legal service as non-legally aided clients. This is often not the case, particularly with respect to young offenders or family clients, where income level and the range of resolution options demand a wider and perhaps more creative response. Not only do the areas of law differ, but the type of lawyer or legal worker required to assist low-income clients can differ as well.

²⁹ *Ibid.*, at 61. See also *The Delivery Systems Study*, *supra*, note 25.

³⁰ *Review of Legal Services in British Columbia*, *supra*, note 15, at 73.

For first offenders or first-time users of legal services, and for clients facing a host of other difficulties in their lives, visiting a traditional lawyer in a traditional lawyer's office can be a daunting experience. The office may be in a different neighbourhood from that which the client is used to; it may be in a large corporate sky-rise; it may be business-focused and formal. Each of these factors can contribute to a client's discomfort with a judicare model and may be a barrier to clients' access to the legal service provided.

One benefit of a judicare model with respect to access to legal services is the relative ease with which such services can be provided to remote communities. For practical reasons, a judicare system seems to be the best way to provide legal services to communities which may not require them on a constant basis. For smaller, remote communities which may require the assistance of a lawyer only once a month, a full-time Staff Office or clinic is an unreasonable expectation.³¹ The practical answer may be to have lawyers doing legal aid work in nearby towns who are willing to fly into the community, as required, to address legal problems which may arise.

(ii) Staff and Clinic Models (with Supervised Paralegal Component)

As distinct as the structure of staff and clinic models may be with respect to the degree of managerial and service input available in the low-income community, the two models have some significant characteristics in common. Both are offices located in particular communities, both have the capacity to include the use of paralegals or community legal workers, and both use salaried lawyers to provide legal services. The National Council of Welfare report, *Legal Aid and the Poor* observes that decentralized Staff Offices are psychologically and physically more accessible to low-income people, especially if the office has strong community links.³² For example, the office may be located in the client's community, or in a nearby community with which the client is familiar, making it easier to get to physically and heightening the community's awareness of the existence of legal aid and the office. Establishing the office as a community service rather than as a service which many communities may use (judicare) may go some way towards increasing clients' use of or access to the service. Also, staff and clinic models are more accessible to legal aid clients because the atmosphere is often less formal than in traditional legal offices. A client's comfort level with the setting in which the service is provided will often lead to or increase that client's willingness to use the service. Finally, although this will vary with type of Staff Office, part of the mandate of community legal clinics is to engage in public legal education through community outreach work. Educating people about their rights often provides them with the confidence to exercise those rights. The ability of clinics to do this work increases clients' access to legal services because it makes them more aware of when those services might be required and useful.

(iii) Access and Other Legal Aid Initiatives

It is important in thinking about access issues to consider the numerous ways in which access to legal services could be improved. True access means that services will meet the varying needs of different legal aid clients. Young clients have different needs from elderly clients, clients with psychiatric difficulties have different needs from clients without such

³¹ *Legal Aid and the Poor*, *supra*, note 28, at 63.

³² See *ibid.*, at 61-62.

concerns, family law clients may require a different mode of legal service from criminal law clients. It is erroneous to assume that all legal aid clients will require or be able to use the same type of service. For example, assisted self-help legal services may work well with simple uncontested divorce cases. However, self-help services would not be appropriate for young offender matters or for women who have been the victims of domestic abuse. In the latter two examples, legal services combined with some element of social work would better serve clients' needs. Family law Staff Offices in Manitoba and youth offices in Alberta have recently been experimenting with the use of social workers or case workers in the delivery of legal services.

(d) LEGAL INDEPENDENCE

A frequently raised concern in discussions about the use of a staff model is that staff lawyers have less legal independence than do private counsel because the lines of control and payment by the government may be more direct.

Ideally, all lawyers should act independently, regardless of who is paying them or the nature of that payment. The threat to independence exists in any legal aid plan; a third-party, the government, is paying for the delivery of legal services to those who could otherwise not afford it. The nature of the payment may vary between the systems, but the fact of government funding remains the same. It is the *fact* of third-party payment, rather than the nature of the payment, that creates the potential for conflict when government funding is involved.³³

The area of law may also affect the perception of legal independence. For example, in family law, the government usually has no direct stake in the issues of the parties, but in criminal law, some would argue, there is a direct link between the client's fate, which rests in the hands of an employer within the broader public sector, and the Crown Attorney, also a public-sector employee. This potential conflict arises not only in the criminal area, but in most areas of "poverty law" and in a significant proportion of family law cases.

In a contract model of legal aid delivery, there is also potential for legal independence to be compromised. Contracting law firms will generally want to ensure that they will "obtain" the next contract. The element of competition in a contract model could make it vulnerable to political considerations, and compromise legal independence. Accordingly, with each of these models, it is necessary to build in protections of independence.

(e) CHOICE OF COUNSEL

Legal aid commentators have observed that, particularly in Ontario's legal aid context, an individual's right to choose a lawyer is viewed as sacrosanct. The Law Society and many members of the legal community argue that the freedom to choose one's own counsel is one of the most important virtues of a judicare system.³⁴

The arguments about the lack of choice in Staff Offices are well known. In criminal cases where the client is faced with deprivation of liberty and the stigma of a criminal record, the quality of the relationship between lawyer and accused is vitally important; as it is in many family law matters, given the often sensitive and intimate nature of the issues involved. The

³³ See *NRLA*, *supra*, note 7, at 159.

³⁴ See *Legal Aid on Trial*, *supra*, note 23, at 4.

full confidence a client must have in his or her lawyer can be best be assured, it is argued, if there is the ability to freely choose the most appropriately skilled and compatible counsel. To have to choose one of a limited range of staff counsel could compromise the result.

However, these arguments about choice of counsel assume that a judicare model provides clients freedom to choose the lawyer whom the client believes will best represent his or her interests. Many lawyers do not participate in the legal aid program and, of those who do, many accept a very limited number of cases. Moreover, clients may actually be disadvantaged in their process of choosing counsel by their relative lack of familiarity with the legal community. Low-income earners more so than middle- and upper-income earners tend not to be informed and skilled consumers of legal services. They tend to lack familiarity with professional relationships, and much of their lives is spent on more fundamental challenges of day-to-day survival. If a client has had some contact with the legal system before, he or she may know of lawyers who may be appropriate representatives in his or her current situation. In both the criminal and the family contexts, word-of-mouth in detention centres, or referral lists provided by women's shelters, may provide some assistance in deciding which counsel to choose. However, even with these recommendations, clients have a limited basis on which to judge whether a particular lawyer is best for them. There are few objective criteria to which judicare lawyers are held which would help clients assess whether a lawyer will adequately represent them in their current predicament.

(f) GENERAL OBSERVATIONS: THE “ONE SIZE FITS ALL” FALLACY

In our view, many of the above delivery-model comparisons are highly suspect in terms of their generalizability, primarily for the reason that the features of interest being compared are not preordained but endogenous to the design of the systems in question, so that these design choices largely predetermine the outcome. For example, a Staff Office is likely to appear more expensive on a cost-per-case basis, at least in the short run, if legal aid tariffs for judicare lawyers are set unrealistically low. Conversely, if judicare tariffs are set very high, a Staff Office will appear cheaper. Similarly, if staff lawyers are paid very generously, and are not asked to carry a substantial workload, the Staff Office is likely to seem more expensive than a judicare delivery model. Conversely, if staff lawyers are paid badly and expected to carry an excessive case-load, at least in the short run, the Staff Office is likely to seem cheaper than a judicare system (depending on the tariff structure).

Thus, a legal aid authority, in choosing how to design the system, can, at least in the short run, generate any outcome it wishes in terms of the relative cost of alternative delivery models. However, in the long run, it is not as unconstrained. Here it needs to be sensitive to the complex interaction of several variables. In setting judicare tariffs, the legal aid authority obviously must be sensitive to the opportunity costs of lawyers undertaking legal aid cases, and hence forgoing privately paid legal work. If the tariff is set significantly below the level of these opportunity costs, then mostly very young lawyers or older and unsuccessful lawyers with low opportunity costs are likely to be attracted into the judicare segment of the legal aid system (while recognizing some role for altruistic motivation in undertaking legal aid work), having predictable effects on service quality. We note here, in passing, that the legal aid tariff in Ontario has not been increased since 1987, and in many cases has been sharply reduced, raising important questions as to the long-term sustainability of current tariff levels, without inducing the predicted quality effects.

Similarly, in setting staff lawyers' salaries and benefits, and determining case-loads, the legal aid authority should be sensitive to the opportunity costs faced by staff lawyers in forgoing opportunities in the judicare market or in privately paid practice, making appropriate adjustments for greater job security, less risk of income fluctuations, and perhaps differences in working hours. Setting staff salary and benefits too low and workloads too high will mean that staff positions will be attractive only to individuals with low opportunity costs, which will have equally predictable long-run effects on service quality. Yet again, staff legal aid lawyers' salaries and benefits cannot be set without taking into account Crown Attorneys' salaries, which in turn need to take into account the opportunity costs of their alternative career options, if these positions are to be attractive to high-quality service providers.

If appropriate financial relationships in a mixed legal aid system can be fashioned among the private legal services market, the judicare market, and the staff market, in the sense that lawyers of comparable quality are attracted to the three sectors, then it becomes possible, in principle, to make cost comparisons that are not an artifact of arbitrary or inappropriate determinations of the legal aid tariff or staff salary and benefit levels, but of underlying relative efficiencies associated with different delivery models in different contexts. These comparisons would focus on the relationship between units of inputs of different kinds required to achieve a given quality and quantity of outputs under different delivery models in different delivery contexts. Given the financial interrelationships that should obtain among these three markets (the private, paid legal services markets; the judicare market; and the staff market), it would be surprising if, *in general*, relative cost differences were large. This seems consistent with the data reviewed above.

For similar reasons it would also be surprising if major *general* differences in quality of services emerged. This view reinforces an observation made at the outset of this chapter, that analysis of relative efficiencies of different delivery models is highly context-specific. For example, it seems obvious that in handling large volumes of routine cases, for example, first appearances, adjournments, and bail hearings in criminal proceedings, economies of scale and specialization are likely to render some form of duty counsel/Staff Office more cost-effective than a judicare system, given the obvious transaction costs, public and private, entailed in handling these matters on a discrete, contracting-out (certificate) basis. For larger, more complex, and unique legal proceedings, it would be surprising if these cost advantages of a Staff Office were to persist; furthermore, for these kinds of proceedings, quality disadvantages may afflict the Staff Office in terms of access to private counsel with proven expertise in the particular case in question, although Staff Offices are more amenable to systematic quality-control mechanisms, and in practice (as noted above) the effectiveness of the judicare system is affected by availability of counsel and the types of information problems facing the client. However, those differences are largely conjectural on our part and await confirmation or refutation from real observed experience with different delivery models in different contexts.

In part because of this caveat, we favour setting up Staff Offices with a full range of responsibilities for service delivery in particular areas of the law (e.g., criminal law, family law, and immigration law), in competition with the judicare system, so that conjectures can be tested as to where the comparative advantages and disadvantages of Staff Offices really lie. In addition, in order to attract high-quality personnel to a Staff Office operation, it is important that there be significant potential for career development through the opportunity for younger and less experienced lawyers to work with senior and more experienced lawyers on more complex cases. Senior lawyers, in turn, are unlikely to be attracted into a Staff Office without

the ability to undertake more complex cases, and younger lawyers will feel that their career-development path is likely to be undesirably truncated if they are confined to working on large volumes of routine cases. In the end, quality of service, motivation, and commitment may be undermined in a Staff Office that, as a matter of policy, is permanently confined exclusively to large-volume, routine matters. The challenge for institutional design then becomes to define the range of large volume, routine matters in which clients may not be given the choice of counsel, owing to the superior cost efficiencies of a Staff Office in relation to such matters, and to establish some appropriately defined (by context) seriousness or complexity threshold above which clients may be offered the choice between Staff Office lawyers and judicare lawyers.

2. ECONOMIC PERSPECTIVES ON THE MARKET FOR LEGALLY AIDED SERVICES³⁵

In choosing among delivery models, and designing their major features, an economic perspective is helpful in illuminating the incentive properties of alternative design choices. While this perspective has rarely been applied to legal aid systems, it has been frequently and fruitfully applied to health care and other social programs. We sketch the focus of this perspective below.

(a) PRINCIPALS AND AGENTS

The basic economic analysis of market structure assumes a homogeneous good or service whose quality is standardized, or at least easily observable. But many goods and services cannot be evaluated in this way. Automobiles and houses are merely two examples of goods whose quality, though of critical importance to the buyer, is not readily observable. Similarly, the effectiveness of professional services and of employees depends largely on the effort expended by the seller, that is, by the professional or employee himself or herself.

This type of situation creates what economists call a “principal-agent relationship”. The words “principal” and “agent” are used here in the economic sense, not in the legal sense. For economists, a principal-agent relationship arises whenever one individual (or organization) is supposed to act in another’s interest. The relationship is problematic whenever the agent has both the incentive and the ability to choose actions that are not in the principal’s interest. If the agent’s interest is perfectly aligned with the principal’s, or if the effect of the agent’s actions on the principal’s interests can be perfectly observed, then there is no agency problem. But if their interests are not perfectly aligned, and if the principal is not fully informed about the agent’s behaviour, then a principal-agent problem arises. Asymmetric information between the principal and the agent creates the opportunity for the agent to depart from the principal’s interest; and, when these departures occur, the market will generally come into equilibrium at some point other than the optimal price/quantity combination that would occur if agency was perfect. As we will see, both asymmetric information and differences in incentives are typically present in the legal aid context.

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This section draws extensively on a background paper prepared for the Legal Aid Review by Hamish Stewart, “An Economic Analysis of Legal Aid Delivery Mechanisms”, Vol. II, this report.

(b) ASYMMETRIC INFORMATION IN THE LEGAL AID CONTEXT

Suppose that the government or the legal aid authority has established a set of criteria for determining which cases should be funded and to what extent, and has chosen a mechanism for funding those cases. The authority might, for instance, have determined that funding will be allocated only to criminal cases with sufficiently serious consequences on conviction or only to family law matters that have a certain degree of complexity. The authority wishes to obtain a given quality of service for legally aided clients while staying within its budget. What is to prevent the authority from simply announcing its criteria to prospective clients and to the legal profession, and observing whether the criteria are being respected?

If every legal matter came with an unambiguous mark of its seriousness or complexity, then the legal aid authority could indeed just sit back and watch its budget be spent wisely. But legal matters are not like that. Before the event, no one really knows for certain whether a given case is going to be serious or trivial, complex or simple; the best one can do is look for indicators of the underlying characteristics of the case. Thus, for instance, the funding criterion for criminal cases cannot be that the accused will go to jail if convicted, because, given the great range of circumstances of accused persons and the discretion of the sentencing judge, before a trial it is impossible to know whether imprisonment will be the result of conviction (unless the offence has a statutorily required minimum term of imprisonment); rather, the funding criterion must be based on an indicator of the seriousness of the consequences of conviction, such as the nature of the offence charged, or a likelihood of imprisonment or loss of livelihood on conviction.

In addition to uncertainty before a trial, there is imperfect information after its conclusion. Typically, the lawyer is in the best position, after the event, to determine whether a given case actually did meet the criteria established by the legal aid authority. Importantly, the lawyer's information on this issue is superior both to the client's and to the legal aid authority's. The client is unlikely to be able to determine the nature of the case with certainty. The authority, though presumably more sophisticated than the client, must also rely on the lawyer's assessment of the nature of the case. There are at least two reasons for this reliance. First, the authority must to a large extent respect the confidentiality of the lawyer client relationship; and, second, even if the lawyer could be required to share all of the case information with the authority, it would be prohibitively expensive for the authority to review each and every file to determine compliance with the criteria.

Thus, in the legal aid setting, the lawyer has two principals, the client and the legal aid authority (and arguably a third—the Law Society—with respect to professional standards). Furthermore, each of these principal–agent relationships has its own informational asymmetry. The legal aid lawyer is, in effect, a “double agent”. On the one hand, the lawyer has both a duty to represent the client's interests and superior information about how to serve the client's interests: the lawyer's framing of the pros and cons of any given course of action is likely to be very influential in the client's decision about whether to pursue that course of action. This sort of authority problem is not limited to the legal aid setting: it arises whenever a lawyer wants to proceed with the case in a way that the client, if fully informed, would not choose. On the other hand, the lawyer is the agent of the legal aid authority in that he or she has a responsibility to respect the funding criteria established or enforced by that authority: the legal aid authority may not wish to fund every procedural step that the lawyer would have recommended to a private client, but the authority is largely dependent on the lawyer's

assessment of whether any given step is warranted in any given case. Importantly, as is true in other third-party-payer systems (such as medicare), this second authority problem arises even if there is no information asymmetry between lawyer and client: both have incentives to seek funding for more extensive representation than the legal aid authority, if fully informed, would be prepared to fund.

An agency relationship creates room for behaviour that is not in the principal's interests. The excess costs that arise because of imperfect agency are often called "agency costs". Agency costs have been extensively studied in corporate governance, in employment relationships, and in the provision of medical services, although much less so in the provision of legal aid. The two main categories of agency costs relevant to legal aid are supplier-induced demand and quality decline.

(i) Supplier-Induced Demand

As noted above, economists generally think of demand and supply as separate functions that interact to determine the price and quantity of a good. But when the supplier of a good is also the agent of an imperfectly informed customer, demand and supply are no longer clearly separated: where the customer's decisions depend on the supplier's advice, there is scope for supplier-induced demand.

Supplier-induced demand has been defined in various ways, but the central idea is that a professional advisor can, because of his or her informational advantage, increase the amount of services that the client would like to use. The mere fact that the impetus to use the services comes from the professional and not from the client is not in itself necessarily a cause for concern; we assume, by and large, that professionals will honestly advise clients as to the appropriate course of action. Thus, services obtained through supplier-induced demand should be considered a cost only when they exceed the quantity of services that have been deemed appropriate, according to some normative criteria. In the context of legal aid, the appropriate normative criterion to apply is not the competitive market outcome; presumably, we have a system of legal aid because we believe that the market, left to itself, does not supply enough legal services to low-income earners. Rather, the question is whether the legal aid authority, if fully informed, would have funded the service. If not, then the authority's demand for the service is supplier-induced.

The literature on supplier-induced demand in health care is extensive.³⁶ A substantial body of studies supports the position that supplier-induced demand is pervasive in medical and dental care. This sort of supplier-induced demand obviously raises serious problems for cost containment and for economic efficiency.

In a legal context, it is hard to imagine that the number of matters, or the number of clients potentially in need of advice or representation, could be affected by the availability of legal aid; therefore, supplier-induced demand for legally aided services derives primarily from two sources. First, lawyers may play an active role in persuading the legal aid authority that a given case, or class of cases, should be funded. This source of supplier-induced demand will be particularly important where opportunities for lawyers to practise privately are declining (or increasing at a slower rate than the supply of lawyers). Economists would normally expect

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This literature is cited in *ibid.*

competitive forces to push lawyers' fees down under these conditions, but if lawyers can persuade the legal aid agency that the existing tariff is necessary to provide proper representation, and that additional cases should be funded, this downward pressure is reduced. Second, lawyers have an important influence on how much work is done on any given case. It is important to note that, in both of these sources of supplier-induced demand, the client's interest is the same as the lawyer's; while it may occasionally happen that the client would be better off with fewer legal services or with no representation or advice whatsoever, in most cases the client will want the lawyer to do the best job possible at the legal aid authority's expense.

(ii) Quality Decline

One of the central manifestations of imperfect information in markets of all sorts is the problem of observing quality. The quality of many goods is not observable until the customer has had time to use the good (or, in the case of some goods, has actually consumed it). While there are many mechanisms, ranging from reputational devices to formal warranties of quality, to compensate for the difficulty of observing quality, there are also many markets in which these mechanisms are likely to be ineffective. Where a principal depends on an agent to obtain a good or a service, the problem of controlling quality is exacerbated: the agent may have an incentive to provide lower-quality work than the principal is expecting to receive.

The quality of a lawyer's work is largely under his or her control; thus, a second type of agency cost that may be important to legal aid is the possibility that the quality of work a client receives may not be at the level the legal aid agency is paying for. But the quality of legal services is difficult to measure. Quality includes not just the result achieved or the technical quality of the legal work performed (e.g., proper drafting of documents or competent representation in court), but the lawyer's ability to inform the client and to respond to his or her instructions. A lawyer who promptly returns necessary phone calls is a better lawyer than one who has to be hounded by his or her clients; a lawyer who enters a guilty plea only when the client is fully prepared to admit guilt is a better lawyer than one who participates, out of laziness, indifference, or financial motives, in a plea of convenience entered by an accused who privately maintains his or her innocence. From the legal aid authority's perspective, both guilty pleas look the same, and the only available measure of the quality of representation on the plea may be whether the client got a reasonable sentence. But, in reality, the second plea was obtained through low-quality service, even though the result is the same as in the first plea. The second plea may result in the lawyer being paid by the legal aid authority for high-quality work without having performed it.

In a market setting, there is likely to be some measure of control over such discrepancies in service quality. Clients will not remain with lawyers who do not treat them with respect or who disregard their instructions; sophisticated or repeat clients may have a basis for comparing the quality of service that they have received on different occasions. Again, as with supplier-induced demand, such control is unlikely to be perfect. But, in the legal aid relationship, where the lawyer is a "double agent" and where both the client and the legal aid authority may lack the ability to observe quality, even these controls may be lacking, and low-quality service may be a severe problem.

(c) AGENCY COSTS AND DELIVERY MECHANISMS

In this section, we discuss how different delivery mechanisms tend to control or to give scope for different agency costs.

(i) Judicare

The judicare model is commonly assumed to be the most amenable to supplier-induced demand. Economic analysis supports this assumption. There are, as noted above, two distinct points at which supplier-induced demand might be relevant to judicare. First, the number of lawyers willing to accept legal aid certificates is likely to increase the number of certificates issued. One might expect that more certificates will be issued when clients have an easier time finding a lawyer; for example, clients who have previously obtained legal aid and had satisfactory service will be more likely to apply for legal aid for subsequent legal problems. More important, one would expect lawyers to encourage prospective clients to apply for legal aid certificates, again causing more certificates to be issued. In a normal market, economists would expect an increase in the supply of lawyers to reduce the price of legal services; but, in the market for legal aid, customers do not have the usual incentive to seek out the cheapest supplier of the good, so that the usual effect produced by an increase in supply on price will not be forthcoming. The legal aid authority could attempt to take advantage of market conditions by lowering the tariff, but this is more difficult to do when the tariff is centrally determined, particularly if the authority is a branch of the Law Society, than in a decentralized, competitive market. Second, in any given case, the judicare lawyer has an incentive to take whatever procedural steps recommend themselves on legal grounds, or at least to attempt to persuade the legal aid authority to fund such steps.

The tariff structure may also have an important influence on the amount of supplier-induced demand under judicare. Roughly speaking, judicare could have three basic tariff structures. First, lawyers could be paid purely on an hourly basis. This tariff structure obviously creates the greatest scope for supplier-induced demand, though it may be necessary in lengthy or complex cases to permit lawyers to bill by the hour. Second, lawyers could be paid block fees so that the lawyer rather than legal aid authority bears the cost of any work beyond the value of the block fee. Supplier-induced demand may be somewhat mitigated by block fees, in that there is no financial incentive to work additional hours when compensation is fixed, although block fees may create incentives for suppliers to economize on quality. Further, block fees do not remove the incentive to get new clients into the legal aid system. Third, lawyers might be paid by the hour, with a cap on the number of hours for each type of case. This tariff structure provides no incentive not to work the maximum number of hours, but it does mitigate some types of supplier-induced demand, in that the lawyer and the client must decide how to spend the hours that are available for each case, rather than trying to persuade the legal aid authority to fund every step. On the other hand, to the extent that lawyers are essentially expected to do the work beyond the cap without remuneration, quality decline becomes an issue.

The consequences of supplier-induced demand when the legal aid authority's budget is fixed are simply described: legal aid cases will be funded according to the ability of lawyers to persuade the authority that their cases meet the criteria, rather than according to the criteria themselves. When the authority's budget is exhausted, some cases that ought to have been funded will not be.

As noted above, an impressive body of research supports the proposition that supplier-induced demand for medical and dental services does occur. We are not aware of any properly conducted quantitative study of supplier-induced demand for legal aid. The rapid increase in Plan costs from the mid-1980s to the mid-1990s, including dramatic increases in costs per case for most classes of cases, may seem to indicate that supplier-induced demand has occurred in Ontario, particularly since, during this period, the legal profession was growing more rapidly than the opportunities for private retainers, and the tariff was basically constant (so that the growth in costs reflects an increase in the quantity of legal aid services provided, not an increase in the price of those services). But, even here, other forces are involved. The increasing complexity of criminal matters (due to the *Charter of Rights and Freedoms*) and family law matters, the explosive growth of certificates for immigration matters, and the effect of the recession on the demand for legal aid services were undoubtedly responsible for much of the growth in legal aid costs. Further detailed empirical analysis would be required to sort out the relative importance of supplier-induced demand and the other forces at work.

The other type of agency cost discussed above was quality decline. There are competing views about quality decline under judicare. On the one hand, one of the normal market mechanisms, the client's ability to exit, will operate under judicare. To the extent that clients are able to choose among lawyers willing to take a certificate, clients will tend to select those lawyers who appear to be offering high-quality service (assuming such lawyers are willing to take legal aid cases). While the nature of the agency relationship between lawyer and client means that the client will never be able to assess quality perfectly, some dimensions of quality can be assessed quite readily even by first-time clients (e.g., Does the lawyer return my phone calls? Do I trust this lawyer with the intimate details of my life?), while other, more technical, dimensions of quality can probably be assessed to some degree by those clients who already have some experience with the legal system. On the other hand, if judicare lawyers overload their practices to the point where they cannot spend adequate time on any one case, and if clients are unable to exit, because, for instance, they are unable to make any informed assessment of the lawyer's ability, or few lawyers in the area take legal aid for that kind of case, quality is likely to decline precipitously. This type of quality decline is more likely to occur with block fees than with hourly payment. The degree of quality reduction under judicare depends on the relative magnitude of these two effects.

(ii) Staff Models

The staff model encompasses at least three methods of delivering legal aid services, each model having very different institutional characteristics. These are:

1. *The pure or direct staff model*, in which lawyers carry cases much as in the judicare model, but are salaried employees of the legal aid authority. Typically, under this model, clients have little or no ability to choose counsel, and lawyers have little or no ability to choose cases. The public-defender offices in many U.S. jurisdictions are examples of the pure staff model.
2. *The duty counsel model*, in which lawyers do not carry cases and typically do not offer representation at trial, but instead offer summary advice and/or representation in non-trial court appearances. Duty counsel offices are typically run by the legal aid authority and are located in or near the courts; lawyers and clients typically do not establish a traditional solicitor-client relationship. The lawyers who work in duty

counsel offices may be full-time employees, or may be private practitioners who are on a rotation to supply services through the office on some form of retainer basis.

3. *The community legal clinic model*, in which legal representation in criminal and family matters is not the focus. While the community legal clinic will always have lawyers on staff, much of the work of advising and assisting clients will be carried on by non-lawyers (in Ontario, community legal workers), who will develop some knowledge and expertise in areas of law that are relevant to the clinic's clientele. In addition, community legal clinics are expected to carry out forms of advocacy that go beyond the representation of individuals' problems to more systemic concerns.

The differences among these three models are obviously important, but for the purposes of a general discussion of agency costs it is not necessary to distinguish them. We will therefore describe the effects on agency costs of a pure staff model.

Supplier-induced demand is not likely to be a serious problem under the staff model. Since staff lawyers are on salary, they normally have no incentive to seek out clients or to do unnecessary work on any given case. This conclusion might not hold if, for some reason, a particular clinic were overstaffed; the staff might then have an incentive to seek out work in order to justify their complement. But this situation is unlikely to arise in the current fiscal climate.

On the other side of the coin, rather than supplier-induced demand, one might expect that staff lawyers would resist increases in their workloads, given that their compensation is unlikely to be tied closely to output. Given an acceptable level of quality, the staff lawyer and the legal aid authority may have different views about the appropriate number of cases for the staff lawyer to carry, and this difference can be thought of as another source of agency costs.

Quality decline may be a greater concern under the staff model, for two distinct reasons. The first is the monitoring problem that has been much studied by agency theorists. Neither the client nor the legal aid authority can easily assess the quality of the work done in any given case; the client lacks legal expertise, while the authority has neither the resources nor the information on which to base a judgement in each and every case. Second, even if straightforward shirking can be contained through a combination of a sense of professionalism, quality-control mechanisms, and benchmarking of the performance of Staff Offices and personnel against one another, lawyers in the staff model may be prone to "burn-out" if burdened with excessive case-loads or mostly high-volume, routine, professionally unchallenging work roles. The legal aid authority has a fiscal interest in getting as much work as possible out of staff lawyers, so there will be a tendency for their work to be intensified. Salaried lawyers are likely to respond by reducing the amount of work done on each case to cope with the increased volume. This process will presumably continue to the point where the lawyers, taking into account their earnings, their hours, their opportunity costs, and their sense of professionalism, are indifferent about staying at the Staff Office and leave to practise elsewhere. As a matter of principle, there is no reason to think that this point will be consistent with the quality of work desired by clients or by the legal aid authority itself.

It has been suggested that staff lawyers are likely to develop a degree of specialized expertise that enables them to do better work in a shorter time than judicare lawyers. Further, it may be appropriate to give clients a degree of voice in the staff model, by representation in the office's governance structure or through some procedure for dealing with complaints.

Moreover, performance evaluation and quality-control mechanisms may be more easily implemented in a more hierarchically structured Staff Office than in more individualized service provision under judicare. These features may well reduce agency costs in the staff model. On the other hand, the inability of clients to choose counsel in some staff models removes one of the standard competitive devices for controlling agency costs. Nor can professionalism or expertise alone prevent burn-out; indeed, professionalism may exacerbate burn-out, in that the lawyer's first response to an intensification of work may be to attempt to maintain quality in handling all matters that he or she is responsible for.

(iii) Contracting-Out

A third model, which has been tried in limited ways in Manitoba and the Yukon, and is an important component of proposed reforms in England and Wales, is the contracting-out of cases. The former U.K. government's report on legal aid, *Striking the Balance*,³⁷ proposes that most future legally aided services in England and Wales should be provided under long-term (three- to four-year) block contracts under a competitive tendering process with private law firms. In addition, classes of activity (e.g., duty counsel services) would also be contracted-out under a competitive bidding process. Under the first variant of this model, the legal aid authority bundles together a block of cases with similar characteristics and seeks bids from private law firms. The authority will presumably accept the lowest bid that it believes is consistent with desired levels of quality. The clients in these cases will then be represented by lawyers from the firm whose bid is accepted by the authority. A block contracting system can be thought of as combining features of both judicare and a Staff Office—or a time-limited Staff Office with private lawyers compensated on a piecework basis.

Contracting-out may be attractive to the legal aid authority because it addresses some of the agency costs created by the relationship between the authority and legal aid lawyers. A rational law firm will presumably tender a bid that is high enough to cover its expected costs of doing a good job on the average case, but low enough to obtain the contract. If the market for legal services is reasonably competitive, the firm must therefore reveal to the authority the true value that it places on the opportunity to take these cases. Furthermore, since the firm bears the risk that the particular bundle of cases it is assigned could be more costly than average, but receives a benefit if the bundle is cheaper than average, the rational bid will also reflect the firm's degree of risk aversion. The authority can therefore control its costs by placing this risk on the firms that are most willing to bear it; less-risk-averse firms will tend to put in lower bids. Thus, it is most unlikely that there will be any supplier-induced demand in a system of contracting-out.

In contrast, the problem of quality decline is not eliminated by contracting-out. Once the rational law firm has the contract, its incentive is to treat every case as a simple one (e.g., in criminal cases, to encourage guilty pleas): since the firm's gross income from this group of cases is now fixed, it can improve its profit only by reducing costs, and perhaps economizing on quality. This agency cost will be exacerbated by the client's inability to change law firms.

But contracting-out need not always imply shabby service. A key feature of contracting-out is that it is not a permanent arrangement; the legal aid authority will regularly have new

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Lord Chancellor's Department, *Striking the Balance: The Future of Legal Aid in England and Wales* (London: HMSO, 1996).

blocks of cases to auction off, and will presumably not grant contracts to firms that have persistently failed to meet prescribed levels of service quality. Although the legal aid authority will never be able to measure the quality service perfectly, there may be some indicators, ranging from the results achieved by the firm for the clients to the responses of clients, that the authority can use to estimate whether the firm has been providing good quality. In other words, the firm's interest in maintaining its reputation with the authority (not to mention with private clients and with other firms) acts as a constraint on shirking and other forms of quality decline.

Another method of controlling quality in contracting-out might be to make the contracts non-exclusive. Rather than having one firm solely responsible for a given block of cases, the legal aid authority might award the contracts to several firms and allow clients to choose among them. This approach would capture the virtues (if any) of choice of counsel in controlling quality, while retaining the competitive character of contracting-out; but it would likely be possible only in larger urban centres, given that blocks of contracts need to be large enough to permit realization of economies of scale and specialization.

Given the relative paucity of experience with block contracting in the legal aid context, we believe that utilization of this delivery model should proceed cautiously and on an experimental basis. In contrast to the former U.K. government's proposals, we do not see block contracting as a panacea for existing deficiencies in the Ontario legal aid system; it may well prove yet one more futile attempt to discover a single "holy grail", in terms of delivery models, for the provision of legally aided services. Empirical evidence suggests that, in general, staff models and judicare models perform comparably in most dimensions, and that each is superior to the other in some contexts. We have no similar evidence to rely on in a wholesale shift to block contracting. In particular, the modalities of the contracting-out process need to be carefully worked through. For example, the legal aid authority, in soliciting tenders on blocks of cases, could pre-set the price per case and invite service providers to submit competing bids based on quality assurance commitments that would, of course, require prior evaluation for appropriateness and post-service monitoring for compliance. Alternatively, the authority could specify in its calls for bids various quality-assurance conditions that it deemed appropriate and invite bids that would compete primarily on price, although the authority would still need to satisfy itself that the quality commitments being made were credible, given the size, experience, and so on of the bidders, and would need to engage in post-service monitoring to ensure compliance with these quality conditions. A third option would be to call for bids on blocks of cases with no price or quality conditions predetermined, with winning bids selected on the basis of the authority's judgment of which bidder presented the most attractive cost-quality trade-offs. Again, as in the previous bidding modalities, prior evaluation of the credibility of quality commitments would be required, as well as post-service monitoring of adherence to these commitments. However, because the selection criteria under the third option, in particular the trade-off calculus between cost and quality, are not specified in advance, the authority is likely to be vulnerable to charges of subjectivity, favouritism, or worse, in its allocation of contracts.

Some of the prior screening and post-service quality-verification problems noted above might be reduced for all three options under a system of franchising, as is currently being implemented in England, where only firms which had precommitted to adherence to a specified set of quality-assurance conditions would be eligible to enter bidding competitions for contracts. Franchising is conceptually distinct from block contracting in that meeting franchise

conditions may be a prerequisite for participation in the provision of legally aided services under any delivery model (analogous to setting conditions to be met for registration on a legal aid panel in Ontario), or for more favourable terms of participation. However, under the former U.K. government's proposals, franchising would become an integral feature of block contracting³⁸. Franchise conditions for block contracts would cover "inputs" (requirements related to the qualifications, experience, and training of service providers); "structures" (requirements relating to the office environment and management, systems, including case management, strategic and financial management, and personnel management); "process" (requirements about the steps, or transactions, to be taken on the file); "outcomes" (requirements related to the level of client satisfaction with the services, the cost and time taken per case, and the case result). Poorly performing firms may lose their franchise status and be disqualified from bidding in future competitions, and hence face strong incentives to perform at acceptable levels in order to minimize or avoid this risk. Another complexity in the contracting-out process is likely to arise in relatively thin markets, where a firm has won an initial contract and developed or reinforced its ability to realize economies of scale and specialization by virtue of the contract; at contract renewal time, the legal aid authority may find no or few competing suppliers in the market, rendering it vulnerable to "hold-up" by the incumbent firm by being forced to continue dealing with it on its terms. Another unresolved question with contracting-out models is the potential scale of transaction costs to the authority in administering the contract-allocation and compliance process relative to the transaction costs of administering a certificate system.

3. QUALITY-CONTROL AND PERFORMANCE MEASURES³⁹

(a) DEFINING "QUALITY"

In the course of public consultations undertaken by this Review and in the course of the research undertaken for it, opinions were often expressed by judges, practitioners, and others as to the high degree of variability in quality of legal services provided by lawyers under the judicare program in various areas of law (e.g., criminal, family, and particularly immigration law), and to a lesser extent by community legal clinics. Most of the evidence supporting these opinions is anecdotal and impressionistic. Nevertheless, we are persuaded that the new legal aid system must assign a high priority to developing effective performance measures and quality-control mechanisms for all delivery models employed by the system.

Defining "quality" is not as simple as it may seem. First, "quality" is, in substantial part, a function of the goals adopted for the legal aid system and the particular delivery models within it. For example, if an important part of the mission of the system is effective communication with clients of varying cultural backgrounds, community outreach, public legal education, and law-reform initiatives, these must be included in any quality-control and performance criteria. Obviously, these objectives may have little or no relevance to a staff

³⁸ See *ibid.*, ch. 3; R. Smith, "You Are Not Alone" in F.H. Zemans, P.J. Monahan, and A. Thomas, eds. in *A New Legal Aid Plan for Ontario: Background Paper* (North York, Ont.: Osgoode Hall Law School, York University Centre for Public Law and Public Policy, 1997); U.K. Legal Aid Board, *Franchising Specifications* (July 1993); and U.K. Legal Aid Board, *Lawyers—The Quality Agenda, Volume One* (July 1994).

³⁹ This section draws heavily on a background paper prepared for the Legal Aid Review by Sandra Wain, "Quality-control and Performance Measures", Vol. II, this report.

performance criteria. Obviously, these objectives may have little or no relevance to a staff duty counsel operation, where “quality” would need to be defined more narrowly to apply to case handling and summary advice at preliminary stages of proceedings, or to the judicare model, where quality again almost certainly takes on different connotations, depending upon the context.

Even if “quality” can be defined in particular legal aid contexts by reference to agreed-upon criteria reflecting the Plan’s objectives in each of these contexts, observing, measuring, and evaluating performance is itself a challenging exercise. Requiring judicare lawyers, Staff Officers, community and legal clinics, or block-contract lawyers to report case outcomes so that these can be compared with those of other providers of similar services is one option, although standardizing for the different nature of case-loads from one service provider to another (reflecting the fact that one service provider may be handling more difficult or problematic cases than another) is problematic. Another problem is that, in some areas of law, proceedings do not yield easily measured outcomes (*e.g.*, in many family law matters). Another approach is to rely on consumer-satisfaction surveys, but it is the nature of things in many areas of law that consumers are often ill informed and unsophisticated, and their judgment about service quality must be accepted with considerable caution. For similar reasons, relying on a reactive, client-driven complaints-investigation system is unlikely to be an effective response.

Notwithstanding these problems of defining and measuring quality of service, it is possible to state, as a general proposition, that problems with quality of service may result from: (a) the lack of access to services (eligibility criteria); (b) the wrong mix of services (*e.g.*, exclusive reliance on legal services); (c) service providers who lack appropriate training and expertise (education, experience, judgment, or cultural sensitivity); (d) negligent performance (careless or inadequate case preparation); (e) deliberate wrongdoing (*e.g.*, charging extra fees to clients above the legal aid tariff); (f) inability to identify individual or systemic problems (ineffective reporting, supervision, or monitoring systems); (g) inability to correct known problems (ineffective training, mentoring, or sanctions).

(b) EXISTING QUALITY-CONTROL MEASURES

Existing quality-control measures for the provision of legal services are primarily those adopted generally by the Law Society, the self-regulatory body for all lawyers practising law in Ontario, and are not specifically adapted to the provision of legal services under the Plan. The principal components of the quality-control measures adopted by the Law Society entail entry standards for admission to the profession; rules of professional conduct; and the complaints and discipline process. While these quality-control measures have the advantage of entailing no direct costs to the public, they are subject to severe limitations in a legal aid context. First, entry requirements are of a quite general character and do not test for competence to undertake specialized areas of practice. Second, rules of professional conduct primarily focus on ethical issues, and only to a minor extent on defining “best practices” to be followed in particular areas of law or particular proceedings. Third, the complaints and discipline process is largely reactive to complaints by consumers or other service providers and for the most part focuses on various forms of misconduct (*e.g.*, misappropriation of trust funds) or egregious forms of delinquency, rather than failure to adhere to competent standards of practice. Fourth, the Law Society’s quality-control measures do not extend non-lawyers

(e.g., paralegals, interpreters, or translators) who often play important roles in the delivery of legal aid in various contexts.

With respect to the community legal clinics, only recently has the Clinic Funding Committee begun to evolve a quality-assurance program and the process of evolution and adoption has been slow and contentious. The main components of this program are:

- (a) performance standards for five key work processes:
 - 1. board governance and overall management
 - 2. understanding the community
 - 3. program planning, development, and evaluation
 - 4. communications
 - 5. services (legal-file management, summary advice, law reform, and community development);
- (b) a system to monitor compliance with the standards (periodic reports, audits, interviews) and to assess performance against customer expectations and program;
- (c) a system to respond to identified quality problems (education, mentoring, sanctions); and
- (d) identification of best practices and continuous improvement through incorporation of best practices into performance standards.

(c) TOWARDS A MORE EFFECTIVE QUALITY-CONTROL REGIME

Effective quality-control measures aspire to provide performance standards for all legal services; provide a system for monitoring performance on an ongoing basis; identify best practices and include them in performance standards and make continuous improvements to them; and apply the standards to all service providers. Potential disadvantages of such a regime are that it relies heavily on the accuracy and appropriateness of performance standards and may be insensitive to deviations from these standards required by the particularities of given cases; may entail significant administrative costs in defining and revising standards, monitoring adherence to them, and enforcing remedial responses or sanctions in the event of deficiencies; may have negative and unintended impacts on professional practice (e.g., by requiring lawyers to spend too much time filing outcome or compliance reports, or completing checklists); and may be more difficult to apply to service providers outside an institutional setting, in particular, private lawyers acting on a case-by-case basis under the auspices of the judicare system.

Notwithstanding these difficulties in the implementation of an effective quality-control and performance-evaluation regime, we strongly believe that a major priority of the new legal aid system should be to implement, over time, such a regime. The basic elements of such a regime would seem to entail the following:

1. *Improved standards for qualifying as a provider of legal aid services.* In our view, this would entail the legal aid system administration specifying minimum professional qualifications for registration on legal aid panels in particular areas of law. It is important here not to be too rigid or unidimensional in specifying these minimum

requirements. Qualifications for registration on a legal aid panel might be obtained in a variety of ways. In order not to create unnecessary barriers to younger and less experienced practitioners becoming active in the Plan, weight could be attached to service in legal aid clinics during law school or to specialized courses or training programs taken during or after law school. For other practitioners, years of practice, with some minimum percentage of practice activity allocated to the area where registration on a legal aid panel is sought, courses taught or taken, or complex trials handled might be appropriate criteria. Some form of point system might be devised that enables the requisite number of points for qualification for registration on a legal aid panel, to be acquired in various ways. Graduated criteria might be adopted for registration on a panel, with higher standards required for eligibility to undertake more serious cases of a particular type. Continuing-education requirements might be imposed as a condition for maintaining registration on a panel. Similar requirements should, in principle, apply to lawyers providing legal aid under different delivery models (e.g., Staff Office, community legal clinics, and block contracts).

2. *Improve the system's ability to detect quality problems.* This is likely to entail the collection of better information from service providers on billing procedures and case outcomes; expanding client surveys; expanding the consumer complaints system; and conducting random file audits to ensure compliance with prescribed standards. Substantially superior information technologies to those at present possessed by the Plan will be required if the system is to acquire effective monitoring capacities, including monitoring abnormalities in billing practices or case outcomes that may be symptomatic of supplier-induced demand or quality deficiencies.
3. *Improve responses to known or suspected problems.* This is likely to entail the provision of peer review and mentoring; requiring education and remedial education and training in response to identified practice deficiencies; and more effective sanctions for persistent deficiencies, such as removal from legal aid panels and a more coordinated complaints and disciplinary process between the Plan and the Law Society.
4. *Experiment with the development of detailed performance standards.* The legal aid system should begin to develop detailed performance standards for particular areas of law and particular classes of proceedings, in consultation with members of the bar, the judiciary, specialized legal associations, and client organizations. These standards should apply to Staff Offices, community legal clinics, lawyers and law firms providing legal services under block contracts, and judicare lawyers.

The challenges entailed in devising and implementing an effective quality-control regime comprising the elements sketched above are not small. However, to date, the legal aid system and the Law Society have barely begun to embark upon this task. Failure to do so in the future is likely to leave unaddressed the substantial agency cost problems (i.e., supplier-induced demand and quality decline) described previously in this chapter. For disadvantaged clients who must have recourse to the legal aid system, legal aid is likely to remain something of a forensic lottery, rather than an assurance of equality before the law, and for taxpayers who fund the system, serious doubts will continue to be harboured as to whether they are getting value for their tax dollars.

4. CONCLUSIONS

This chapter has sought to make the case for a much more eclectic and diverse set of delivery models for the provision of legal aid in Ontario than has hitherto been the case. In particular, we have sought to make the case for a custom-designed delivery system that is tailored to the particularities of given classes of legal services, given geographic locations and the particular circumstances of individual clients. The overriding objective motivating this approach is the provision of maximum coverage for legal aid needs from a fixed budget—put bluntly, getting maximum mileage from a fixed amount of resources. This will require that the new legal aid system be entrepreneurial, innovative, open-minded, adaptive to changing needs and circumstances, and daring—that is to say, willing to take calculated risks by trying the untried and, at the same time, after giving them a fair trial, willing to cut its losses by abandoning unsuccessful initiatives and pursuing others. Operating under an open-ended budget, the legal aid system, until very recently, had few incentives to assign a high institutional premium to these characteristics. Now, in an era of fixed budgets, the legal aid system has no choice but to reconceive itself along these lines if it is to honour its commitment to the people of Ontario—both many of the province's most disadvantaged residents for whom the availability or lack of availability of legal aid is often of the most serious moment in their lives, and the taxpayers of the province who are asked to fund the system—to ensure that the ideal of equality before the law is realized as fully as our resources permit.

In choosing the elements of a substantially enriched and more diverse delivery system, the legal aid system should be guided by several basic principles. First, the legal aid system should seek to narrow the gap between full representation and no representation (an “on/off switch” approach to legal aid) by instituting a greater variety of legal services in order to assist a broader spectrum of potential clients. Full services for a small subset of needy clients, and no services at all for many others, is simply not an acceptable outcome. The range of services that might be made available, depending on the seriousness and complexity of the legal matters at issue, might range across a wide spectrum, from public legal education to preparation of self-help kits, duty counsel, Staff Offices, community legal clinics, judicare, block contracting and so on. That is to say, for financially disadvantaged clients with legal needs, it should rarely be the case that doing nothing should be the chosen option—principally by posing as the alternative the issuance of a judicare certificate, at the other end of the spectrum, which in many cases is an unsustainable option, given cost implications and budgetary constraints.

Second, the choice of delivery models must be highly sensitive and adaptive to context—the legal context in which services are required, the geographic context where they must be provided, and the special-needs context of particular client groups who require these services. As we have argued earlier in this chapter, for large-volume, relatively routine matters, duty counsel might be the appropriate response, either as part of a Staff Office or, where the size of the case-load does not warrant a Staff Office, on a stand-alone basis. While this may deprive clients of choice of counsel in this range of matters, recent budgetary cutbacks in many cases mean no counsel at all. Geographic context is also important. Obviously, in order to realize economies of scale and specialization, Staff Offices require substantial case-loads, which means that they are likely to be justifiable only in substantial urban centres. Nevertheless, in smaller communities, the legal aid system might still find it appropriate to hire duty counsel either on staff or on retainer to provide basic services in routine matters.

Client context also matters. Particular groups of clients often have distinctive legal, linguistic, or cultural needs that require tailored responses. The specialized community legal clinics with respect to children and youth, the elderly, Aboriginal people, environmental concerns, the African-Canadian community, and so on—already reflect a partial response to such needs. However, additional responses are likely to be appropriate in various contexts. For example, Jonathan Rudin, in a research paper prepared for this Review⁴⁰ makes a persuasive case for establishing a network of Aboriginal legal service centres in major urban centres throughout Ontario where there is a significant Aboriginal population to service the legal needs of Aboriginal people living in these centres or nearby reserves. Rudin contemplates that, in many cases, these Aboriginal legal service centres would be integrated with local Aboriginal Friendship Centres and would provide culturally accommodating one-stop service for Aboriginal people in their catchment areas, including criminal and family law services. While community legal clinics have generally been opposed to assuming major responsibilities for the delivery of criminal law and family law services out of a well-founded concern that the volume of needs in these areas is likely to overwhelm their principal “poverty law” mandate, Rudin’s proposals demonstrate that once again there are few absolutes or system-wide generalizations possible in choice of delivery models. Similarly, in the remote communities of Northern Ontario, a powerful case can be made for extending the number and scope of specialized full-service Aboriginal legal service centres with “fly-in” responsibilities for servicing remote communities in their catchment areas⁴¹. Similarly again, the special legal needs of mentally handicapped clients—in the criminal justice system, guardianship proceedings, and committal and hospital review proceedings—almost certainly call for tailored responses⁴². In short, context is everything in the choice of delivery models—legal context, geographic context, and client context. System-wide generalizations about the advantages and disadvantages of different delivery models cannot remotely capture these context-specific particularities.

Third, while different delivery models will often be complementary to one another, in some contexts we believe that there are substantial advantages to creating competition between different delivery systems. This is particularly true in the case of Staff Offices and the judicare system, at least in larger urban centres. We take this position for several reasons: (a) The existing empirical evidence on the relative performance characteristics of these different models in terms of cost, quality, accessibility, and social impact is so indeterminate that further experimentation is required to test the relative performance characteristics of these models against one another. This necessarily requires that the models compete across roughly the same range of legal matters. (b) We believe that intermodel competition will impose a desirable form of discipline on each of the competing models. Individual service providers within each system will be sensitive to the fact that the client choices will, in part, reflect perceptions of relative quality of service, convenience, expertise, promptness, courtesy, and so on available from providers in the other system and that their own professional prospects will

⁴⁰ Jonathan Rudin, “Legal Needs of Aboriginal People in Urban Areas and on Southern Reserves”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

⁴¹ See Donald Auger, “Legal Aid, Aboriginal People and the Legal Problems Faced by Persons of Aboriginal Descent in Northern Ontario”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

⁴² See Patti Bregman, “Special Legal Needs of People with Mental Disabilities”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

eventually be affected by these client choices. At a systemic level, if the legal aid system seeks to impose excessive case-loads on Staff Offices, those offices can simply refer clients out to judicare lawyers. If judicare lawyers demand excessive tariffs for their work, these demands can be resisted, and clients redirected to Staff Offices. Threats of strikes by personnel in either system in an attempt to extract additional returns from the legal aid system will be disciplined by the existence of an alternative delivery system. (c) Intermodel competition preserves, and indeed enhances, client choice of counsel in those ranges of matters in which the models directly compete. (d) For reasons noted earlier, to attract high-calibre senior and junior legal staff to Staff Offices, their mandate cannot be confined only to large-volume, routine matters.

Fourth, in choosing delivery models in particular contexts, the legal aid system should be sensitive not only to relative cost considerations, but also to relative quality considerations. The ability to insist on and make operational an effective quality-control regime in a particular context should significantly influence the choice of delivery model in that context if agency costs in the form of supplier-induced demand and quality decline are to be contained to reasonable limits.

These general conclusions on choice of delivery models frame and shape the more particular recommendations we develop in succeeding chapters that focus on the provision of legal aid in specific contexts. As stated at the outset of this chapter, no single issue in the development of legal aid systems in Ontario and elsewhere has generated as much debate as the choice of delivery model. We believe that much of this debate has been unproductive, ideological, or self-serving, and has avoided the hard work of choosing and tailoring particular delivery responses to particular classes of legal needs. Because debates over delivery models have only recently begun to focus on this more productive issue, little hard empirical or comparative evidence exists as to which delivery model is optimal for which context. Of necessity, this means that the new legal aid system will need to adopt an innovative and experimental mind-set, involving significant elements of trial and error, as it redesigns the system for delivering legal aid across Ontario.

However, the alternative—preserving the *status quo*—is unsustainable, given the impact of recent budgetary cutbacks and the prospect of fixed budgetary resources for the future. The present lack of coverage of tens of thousands of disadvantaged Ontarians with pressing legal needs is an indictment of our collective commitment to equality before the law for all Ontario residents—a defining tenet of all representative liberal democracies—and provides us with no choice but to rise to the challenge of devising new and innovative ways of doing more with less.

5. RECOMMENDATIONS

1. The Plan should seek to narrow the gap between full representation and no representation through provision of a much greater variety of legal services in order to assist a broader range of potential clients by invoking a wide spectrum of delivery mechanisms, including, for example, public legal education, duty counsel, supervised paralegals, Staff Offices, community legal clinics, judicare, and block contracting.
2. The choice of delivery models must be highly sensitive and adapted to context—the legal context in which services are required, the geographic context where they must

be provided, and the context of particular client groups with special needs who require these services.

3. In choosing delivery models in particular contexts, a premium should be attached to early intervention to promote issue identification, settlement, mediation, diversion, and referral to other community agencies, rather than withholding legal assistance until disputes have become more intractable and costly to resolve, which may be counter-productive and impose greater demands in the long term on both the legal aid system and the underlying justice system.
4. While different delivery models will often be complementary to one another, there are also substantial advantages, in various contexts, of creating competing delivery models, for example, judicare and Staff Offices in criminal law, family law, and refugee/immigration law in larger urban centres.
5. In choosing delivery models in particular contexts, the Plan should be sensitive not only to relative cost considerations, but also to relative quality considerations, in particular the ability to prescribe and implement an effective quality-control regime in order to control problems of supplier-induced demand and quality variability or deterioration.

PART II: A BLUEPRINT FOR LEGAL AID SERVICES IN ONTARIO

RENEWING THE COMMITMENT TO LEGAL AID

In our meetings across the province, we were often reminded of the enviable reputation of the Ontario legal aid system both at home and abroad. Those who have been involved in legal aid over the years as service providers, supervisors, administrators, and governors of the system are justifiably proud of that reputation and of the achievements which underlie it. However, the advent of funding restraints, and most particularly the imposition of a funding cap on a system which was designed to function without one, has had a traumatic effect. This has given rise to a need for a revised and reinvigorated approach to the delivery of legal aid services in the province.

Over the years, a set of understandings, both explicit and implicit, had developed between the legal aid system and the government of the province. Those understandings may have served us well in the context of a legal aid system which enjoyed a history of more or less continuous expansion in terms of funding provided and the range of services it could offer to the public. These understandings have not served as well, we believe, in a period of fiscal constraint. What is now needed, in our view, is a new set of understandings, a new set of reciprocal commitments between the legal aid system and the government of the province.

We emphasize that our vision for the legal aid system rests on an exchange of commitments because we believe that a new beginning for legal aid can be made only if commitments are forthcoming from both sides of the legal aid equation in Ontario. In this chapter, we attempt to identify elements of an exchange of this kind which will, we dare to hope, enable the Ontario legal aid system to regain its pre-eminence in this field by providing a broad range of efficient and high-quality legal aid services to the people of Ontario.

1. A SHARED VIEW OF THE FUNDAMENTAL PURPOSE OF LEGAL AID

ACCESS TO JUSTICE

- The fundamental objective of the legal aid system is to promote equal access to justice by identifying and meeting the diverse legal needs of qualifying individuals and communities.

Successful collaboration between the legal aid system and government requires a shared vision of the goals and mandate of the legal aid system. The mandate of the system has, from its beginning, been to promote access to justice across the province. This mandate flows from the desire of Ontarians to live in a province which promotes fairness and justice, as is reflected

in the commitments of successive provincial governments which have invested significant resources in achieving, or attempting to achieve, this important objective.

We favour maintaining this wide mandate for a number of reasons. We have earlier attempted to portray the broad range and compelling nature of the needs for legal aid services that exist in Ontario. We have attempted to demonstrate that significant injustice can occur across a broad range of legal subjects if legal assistance is not available. We believe that is important, therefore, not to restrict the mandate of the legal aid system to particular fields of law.

If this is not to be the mandate of the system, however, the new and narrower mandate for the system must be clearly crafted and understood both by the government, which should bear the political responsibility for any narrowing of the mandate of legal aid, and by the legal aid system, which can function properly only if it has a clear understanding of that mandate.

2. COMMITMENTS OF THE LEGAL AID SYSTEM

The following commitments of the legal aid system will, we believe, both enhance the capacity of the system to fulfil its mandate and, at the same time, strengthen the confidence of both the government and the public at large in the system itself.

A NEEDS-BASED SYSTEM

- The legal aid system shall identify and assess the needs of those who are unable to afford legal services and seek to meet those needs appropriately.

The design a legal aid system, in our view, should be based an ongoing assessment of the actual legal needs of those whom the system is designed to serve. Although this might appear to be an uncontroversial proposition, we believe that the legal aid system in Ontario needs to enhance its capacity to identify and quantify the needs for service delivery as it evolves into a system which can work within a fixed annual budget. Although the legal aid system has engaged in priority-setting activity in various ways in the past, the need for priority-setting in a system with capped funding is intensified. Strategic planning for the system will require an understanding of the changing nature of these needs, both locally and system-wide. The legal aid system should be driven, in our view, by an ongoing monitoring and assessment of the needs of Ontarians for legal aid services.

QUALITY OF SERVICE

- The legal aid system shall be responsible for ensuring that the legal services it provides are of consistently high-quality across the province.

Quality assurance is an important issue for any service provider, and no less so in the context of the delivery of legal aid services. Indeed, in chapter 7 of this report, we argued the case for a more proactive approach to quality-assurance issues in the legal aid context than has been followed in the past. Such quality-control measures as have been adopted by the profession more generally have, as we have argued, severe limitations in the legal aid context. Accordingly, we believe that this is an area in which a more vigorous approach should be taken by the legal aid system.

Quality-control issues are important for another reason. As the ongoing debate with respect to the virtues of various models for providing legal aid services continues, it is increasingly apparent that not enough is known about the relative quality of services provided by different delivery models. A more sustained approach to setting performance standards and monitoring performance on an ongoing basis will be of assistance, therefore, not only with respect to quality-assurance, but with respect to choice of delivery model.

PRIORITY-SETTING

- The legal aid system shall set priorities for service delivery in order to target available resources to the most appropriate cases.

Although it has always been necessary for the legal aid system to engage in priority-setting activities of various kinds, priority-setting assumes a new level of importance in a legal aid system with capped funding. We have suggested above that a new model for priority-setting should blend the best features of the priority-setting experience of the clinic system with what has been learned from the priority-setting experience of the certificate side of the system in recent years. More particularly, we have suggested that a new model for priority-setting within the legal aid system should be based on consultation, environmental scanning of needs, a blending of system-wide and local strategic planning for the system, and the integration of a range of service-delivery models into priority-setting exercises. We have suggested that the range of considerations taken into account in setting priorities needs to be less dominated by a focus on the liberty of the subject and to be more inclusive of the variety of other interests that create serious needs for legal services. We have suggested that the system should enhance its capacity to determine its priorities strategically in order to achieve the greatest impact possible with available resources. Finally, we have noted that priority-setting must be subject to revision in the light of experience and the changing social and legal environment.

COST-EFFECTIVENESS AND ACCOUNTABILITY

- The legal aid system shall be responsible for assuring the public that legal services are being provided in a cost-effective manner and that effective use is being made of modern information - technology and management techniques.

Although the legal aid system has entered into an era of fiscal restraint, it is nonetheless true that significant amounts of public money continue to be devoted to the provision of legal aid services in Ontario. At the same time, governments in Ontario and elsewhere have developed a heightened sensitivity to the need for effective monitoring of the use of public moneys. There is therefore an increasing need for the legal aid system to be able to demonstrate that it is efficiently managed and is deploying the techniques of modern management that are appropriate to the running of a public agency of this importance and magnitude. In particular, it will no doubt become increasingly important for the system to be able to effectively utilize modern information technology both in the service-delivery systems and in the generation of statistical information that will facilitate internal monitoring, strategic planning, and external accountability.

The need for increased cost-effectiveness does not arise exclusively, however, as a response to the exigencies of fiscal restraint. A more cost-effective legal aid system will be

better able to maximize coverage, sustain high-quality service, and discharge the law-reform mandate we envisage for the system.

SERVICE-DELIVERY MODELS

- The legal aid system shall be flexible, innovative, and experimental with respect to service delivery in order to maximize its ability to meet legal needs effectively and efficiently.

In our discussion of delivery-model issues, we have described a broad range of methods of providing legal aid services of various kinds. If a legal aid system aspires to provide a broad range of services while surviving within the fiscal environment of a budget cap, it will be necessary to adopt an innovative approach with respect to the use of a mix of delivery-models. As experience within Ontario with the use of delivery-models other than judicare is rather limited, especially in the contexts of criminal and family law, it will be necessary for an experimental approach to be taken. If significant change is to occur, and we believe that it should, the legal aid system will require sufficient resources to develop, implement, and monitor service-delivery strategies which attempt to maximize quality and coverage and, at the same time, to drive any inefficiencies out of the system.

LAW REFORM

- The legal aid system shall undertake ongoing research and develop strategies to implement law and procedures which encourage access to justice and an efficient, integrated justice system.

One feature of the approach taken in this report has been to try to understand the legal aid system as a component of the larger justice system that both affects and is affected by the latter. The legal aid system has a unique perspective and, in a capped funding system, an economic incentive to take a serious interest in the modernization and simplification of the administration of justice by acting as an agent of change with respect to such matters. Promotion of reform of the law and practice by the legal aid system will repay dividends not only to the direct clients of the legal aid system, but to the broader public as well. It is therefore important, in our view, that the legal aid system develop the capacity to act as an instigator of this type of reform. In order to carry out a mandate to be innovative and experimental with respect to service-delivery issues, it is obviously important for the legal aid system to develop a research and policy capacity that will facilitate innovation and experimentation of this kind. Accordingly, we envisage that the legal aid system should have a strong research and policy capacity and that a significant portion of its budget would be devoted to research-and-development matters.

DIVERSE NEEDS

- The services of the legal aid system shall be responsive to persons with diverse needs, including ethnic, racial, cultural, and linguistic minorities; persons with disabilities; Aboriginal communities; women; children; youth; and the elderly.

One of the strong features of the existing legal aid system in Ontario is that it strives to implement an ambition to carry out a commitment of this kind. Thus, specialty clinics have

been developed to serve particular communities with diverse needs. It is nonetheless our view that these efforts should be redoubled. The report of the Commission on Systemic Racism in the Ontario Criminal Justice System,¹ the research work done for this Review on issues relating to Aboriginal needs for legal aid services² and many of the submissions made to the Review both in writing and at our public hearings served to reinforce the view that further efforts in this direction should be undertaken by the legal aid system.

GOVERNANCE

- The legal aid system's governance structure must be one that will attract public credibility and legitimacy and will have the capacity to effectively discharge its mandate in the public interest.

The provision of high-quality legal aid services across a broad range of service areas is an issue of considerable public importance. The functioning of the legal aid system is highly visible both within government circles and to the public at large. It absorbs considerable public resources and is an important contributor to the proper functioning of the administration of justice within the province. It is therefore of vital importance to the proper functioning of the system that its governance be widely viewed within government circles, within the public at large, and, of course, within the legal profession as a credible and legitimate authority. As well, the governance structure must have, in fact, the requisite legal and managerial skills and knowledge of social conditions to enable it to effectively discharge its mandate in the public interest.

3. COMMITMENTS OF GOVERNMENT

As we have indicated, we believe that the commitments of the legal aid system must be matched by a set of commitments from the government of the province of Ontario. More particularly, we envisage that the commitments to be given by the province are those set out below.

INDEPENDENCE

- The government shall commit itself to the independence of the legal aid system from government.

In the overwhelming majority of legal disputes involving legally aided services, the government is the opposing party. In criminal and quasi-criminal law, the government appears as prosecutor. In many "poverty law" cases, either the provincial or the federal government appears as the agency against whom relief is sought. In immigration and refugee cases, the government is the party in opposition. In many family law cases, the government may be seeking to intervene in the circumstances of a particular family setting or may be, at least, an interested party. In order for there to be a perception of fairness on the part of legal aid

¹ *Report of the Commission on Systemic Racism in Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995)

² See the background papers prepared by Donald Auger and Jonathan Rudin, reproduced in Vol. II of this report.

recipients, it is vital that the legal aid system be in fact, and be seen to be, independent with respect to its policy-setting and decision-making functions concerning the representation of clients. Accordingly, we believe it to be of critical importance that the government continue to publicly commit itself to this view of its relationship with the legal aid system.

FUNDING

- The government shall ensure adequate, multiyear, stable funding to enable the legal aid system to carry out its responsibilities.

The fiscal crisis of the last few years demonstrates the desirability of a multiyear funding commitment for a program such as the legal aid system. With respect to many of the services provided by the Plan, the commitment to provide the service is made at the beginning of a matter, say, the laying of charges in a criminal case, but the completion of the service may well take several years. For this and other reasons, the budget of the legal aid system is difficult to manipulate on a short-term basis.

Accordingly, it would be highly desirable for the government to commit itself to multiyear budgets for legal aid, as it has done under the 1994 Memorandum of Understanding. This is especially desirable, as we have suggested, if the legal aid system is to become more innovative and experimental with its mix of service-delivery-models. If the legal aid system is to be able to invest in change with a view to building, over time, a system which is both highly efficient and highly effective, it must be able to have confidence that the innovation will have a shelf life beyond the limits of a single budgetary year.

Further, as we have indicated, the legal aid system is in some sense hostage to changes in other parts of the legal system. Important reform of some aspect of the administration of justice in family law or criminal law, for example, may create a very large and, perhaps, temporary increase in the demand for legal aid services. The current MOU between the Law Society and the government admits of the possibility of further budgetary allocations in the event of such shocks to the system, and a capacity for flexibility of this kind would also be a desirable feature of future fiscal understandings between the legal aid system and the government of Ontario.

SYSTEMIC REFORM

- The government shall commit itself to ongoing scrutiny and reform of those features of the underlying justice system that constitute major determinants of legal aid needs.

As we have indicated above, one of the important roles we envisage for the legal aid system in the administration of justice is to act as an agent of change for the system. For its part, the government must commit itself to engage in appropriate reform of the underlying justice system. Although the particular interest of the legal aid system in reform of this kind is to generate further efficiencies in its work, the result of such reform efforts, of course, is to increase the efficiency of the justice system and, therefore, access to justice for all Ontarians. This is a worthy objective for the government of a province, and one which should form a part, we suggest, of the government's commitment to the legal aid system and to the people of Ontario.

In subsequent chapters of this part of this report, we attempt to work out the implications of these commitments or understandings with respect to service-delivery in various substantive areas of the law, with respect to funding and financial arrangements, and with respect to the governance of the legal aid system.

4. RECOMMENDATIONS

The legal aid system and the province of Ontario should manifest their renewed commitment to legal aid by formally exchanging and recording in the *Legal Aid Act* the following set of understandings:

(a) A Shared View of the Fundamental Purpose of Legal Aid

Access to Justice

- The fundamental objective of the legal aid system is to promote equal access to justice by identifying and meeting the diverse legal needs of qualifying individuals and communities.

(b) Commitments of the Legal Aid System

A Needs Based System

- The legal aid system shall identify and assess the needs of those who are unable to afford legal services and seek to meet those needs appropriately.

Quality of Service

- The legal aid system shall be responsible for ensuring that the legal services it provides are of consistently high quality across the province.

Priority Setting

- The legal aid system shall set priorities for service delivery in order to target available resources to the most appropriate cases.

Cost Effectiveness and Accountability

- The legal aid system shall be responsible for assuring the public that legal services are being provided in a cost-effective manner and that effective use is being made of modern information-technology and management techniques.

Service-Delivery Models

- The legal aid system shall be flexible, innovative, and experimental with respect to service delivery in order to maximize its ability to meet legal needs effectively and efficiently.

Law Reform

- The legal aid system shall undertake ongoing research and develop strategies to implement law and procedures which encourage access to justice and an efficient, integrated justice system.

Diverse Needs

- The services of the legal aid system shall be responsive to persons with diverse needs, including ethnic, racial, cultural, and linguistic minorities, persons with disabilities; Aboriginal communities; women; children; youth; and the elderly.

Governance

- The legal aid system's governance structure must be one that will attract public credibility and legitimacy and will have the capacity to effectively discharge its mandate in the public interest.

(c) Commitments of Government*Independence*

- The government shall commit itself to the independence of the legal aid system from the government.

Funding

- The government shall ensure adequate, multiyear, stable funding to enable the legal aid system to carry out its responsibilities.

Systemic Reform

- The government shall commit itself to ongoing scrutiny and reform of those features of the underlying justice system that constitute major determinants of legal aid needs.

CRIMINAL LAW LEGAL AID SERVICES

Basic principles have evolved in meeting the responsibility of providing effective legal representation to low-income Ontarians who are involved in the criminal justice system. These principles, though not exclusive to criminal law services, range from ensuring that high-quality legal services are available to everyone, regardless of income; that the delivery system is responsive to and able to address priorities across the broad spectrum, and often distinct nature, of the needs of its clientele; that the level of services provided is consistent across the province; that the system is flexible and responsive to changing justice-related practices and is able to assist in changing those practices; that it is funded adequately; and that funds are spent wisely.

This chapter briefly describes the current context in Ontario in which criminal law legal services are delivered in relation to case coverage, delivery-model mix, and client needs. It then goes on to outline key issues relating to the delivery of those services. Building on previous discussions in this report supporting the need to introduce more delivery-model diversity into our system and the need to assess needs, set priorities, and ensure quality control and responsiveness, this chapter proposes a model for the delivery of criminal law legal aid services that attempts to achieve the best balance of the competing demands on the system. It then goes on to discuss briefly the integrated relationship between the delivery of criminal law legal aid services and Crown practices and procedures. The chapter concludes with a list of recommendations relating to criminal law legal aid services.

1. ONTARIO CONTEXT

(a) CASE COVERAGE

In fiscal year 1996/97, 73,464 legal aid certificates were issued for criminal cases. As the Plan dealt with only the most serious criminal law matters, the average cost of a completed criminal case rose 8 percent from \$1,240 in 1994-95 to \$1,338 in 1995/96. The total budget for criminal legal aid certificates for that fiscal year was approximately \$110.6 million.¹

Legal aid represents approximately one-third of persons charged with criminal offences, although it provides limited duty counsel services to a larger proportion at the early stages of proceedings.

¹ Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report 1996*, at 8.

(i) Adult

At present, certificates are granted in criminal law matters only where the accused is likely to face incarceration upon conviction. It is not a ground for issuing a certificate that a criminal record having serious implications for a person's future may be created; or that there is a likelihood of the accused losing his or her means of earning a livelihood; or the fact that an individual lacks the capacity to deal with the evidence, issues or procedures without representation.

As a result of tariff restructuring, all pre-set, block fees for legal services have been eliminated. Lawyers are paid on an hourly basis for their work, with caps imposed on all services rendered. Separate fees for pre-trial and bail meetings with Crown attorneys have been eliminated, and remuneration for travel time has been restricted. The tariff has not been increased in ten years, and discretionary increases are limited to exceptional cases and cannot in total exceed 5 percent (2 percent with respect to summary offences)² of the overall budget for the fees for a particular type of legal matter. As well, mandatory case management has been instituted for complex and serious criminal matters. This practice requires counsel to meet with the local Area Director or Provincial Director to establish a budget for the defence.

(ii) Young Offenders

Legal aid costs in youth court matters represent between 12 and 15 percent of all criminal law legal aid costs. While the same tariff charges noted above apply in this area as well, eligibility is governed by section 11 of the *Young Offenders Act*.³ The wording of this section makes legal aid coverage mandatory when ordered by a youth court judge. In turn, the court has no discretion to refuse an application for coverage to the court, properly made, regardless of the nature of the charge or the financial circumstances of the applicant or his or her family.

(b) SERVICE DELIVERY

The vast majority of criminal law legal aid services in Ontario are delivered through the judicare model. As discussed earlier, this model provides eligible accused persons with a legal aid certificate that can be taken to any lawyer of the client's choice who is willing to act on the basis of legal aid for that particular case. The lawyer is remunerated according to the pre-set (and below-market) tariff rate, and is subject to a cap on the number of hours that may be billed.

In addition to the judicare services of the private bar, duty counsel are currently available to perform a limited range of functions in the provincial courts, including: advising accused persons of their rights and their options; speaking to sentence if the accused wishes to plead guilty; negotiating for withdrawal of charges, adjournments, alternative measures, or diversion; and conducting bail hearings. Except in a few pilot projects, there is at present no financial-eligibility testing for the use of duty counsel

² Note that as a result of S.C. 1995, c. 229 a number of quite serious matters can be prosecuted summarily (e.g., sexual assault, assault bodily harm, forgery) with penalties of up to eighteen months in jail.

³ *Young Offenders Act*, R.S.C. 1985, c. Y-1.

services, since those services generally require only a very small amount of counsel's time and greatly facilitate the administration of the courts.

In 1995-96, approximately 372,000 people were provided services by criminal law duty counsel, both salaried and private bar fee-for-service, in adult and young offender matters. It is estimated that the cost of duty counsel amounts to less than \$40 for each person assisted by the private bar, and just over \$10 per person assisted by salaried duty counsel in the criminal courts and through the Hotline Service.⁴

The delivery of legal service under the *Young Offenders Act* is, as are adult criminal law matters, premised upon a judicare model—primary reliance on the private bar, with some duty counsel services. In addition, some general-service community legal clinics, student legal aid societies, and community organizations assist youth who come into conflict with the justice system. A specialized community legal clinic called Justice for Children and Youth, in addition to its work on other issues, provides some services in relation to systemic issues arising in the laws, policies, and practices relating to youth and children.

(c) CLIENT NEEDS

As the submission of the Criminal Lawyers' Association to this Review suggests, persons charged with a criminal offence are in an unusual position. They are unwilling participants in state-initiated proceedings which give rise to a constitutional right to counsel for accused persons in complex matters. The prosecution is always represented by a lawyer specializing in criminal law and assisted by the expertise and resources of the police, and by expert witnesses as necessary. As noted by the Ontario Judges' Association in its brief to the Review: "In the criminal justice system, there is an inevitable imbalance between the power and resources of the Crown, and the power and resources of an individual accused. Legal aid is intended to bring some balance to the field".⁵

Moreover, criminal proceedings must progress without unreasonable delay or run the risk of being stayed by the courts.⁶ Cases are becoming increasingly complex, and professional standards require that lawyers assert all relevant defences and bring *Charter of Rights and Freedoms* motions where appropriate.

(d) IMPACT OF RECENT REDUCTIONS IN COVERAGE

Against this backdrop of increasing case complexity and the decrease of legal aid resources in the criminal justice system, there has been a dramatic decline in the number of criminal accused who are granted certificates. The Ontario Judges' Association and the Criminal Lawyers' Association have expressed concern that an increasing number of accused persons are appearing in court unrepresented. Other groups, including African-Canadian and Aboriginal organizations, have said that these and other changes create difficulties in securing early release. Many submissions to the Review identified the need for more legal information to be available to accused persons so they can understand their legal rights, the consequences

⁴ *Ibid.*, at 7.

⁵ See the Ontario Family Judges' Association and the Ontario Judges' Association submission to the Ontario Legal Aid Review, at 24.

⁶ See principles set out in *R. v. Askov*, [1990] 2 S.C.R. 1199.

of the proceedings, and, more generally, the stages of the criminal process in order to make informed choices. Lack of information about legal aid in the language of the client is a particular concern among linguistic-minority communities.

The criminal bar, through its association, has expressed serious concern about the impact of the reduction of legal aid coverage. In their view, there is reason to be concerned that innocent people are pleading guilty to matters where they have a valid defence because they do not have enough funds to pay for a lawyer. They plead guilty, often, simply to "get it over with". Lawyers have also indicated that, while clients are making greater efforts to obtain private retainers (especially with respect to bail), this is not alleviating the situation to any significant extent.

Duty counsel lawyers have reported a large increase in their case load, a growth in complexity of the matters that they are now covering, and the concerns they have about the inadequate attention they are able to provide to clients under very rushed circumstances. As well, duty counsel are having to respond to the increase in time now spent doing non-legal work, such as calling sureties and setting up diversion arrangements, without the availability of sufficient additional resources.⁷

Student-based community clinics report that they have seen an increase in the number of applicants seeking assistance in criminal matters since the reduction of services by the Plan. For example, Downtown Legal Services at the University of Toronto reports that its criminal files have grown from 30 to 56 percent of its case load.⁸

This Review also learned from its province-wide public consultations that the impact of the reduction in criminal law services has resulted in regional differences in the level of legal representation available. Some areas report a higher reliance on duty counsel or student legal aid clinics, and others report a higher number of unrepresented accused.

Generally, we perceived a strong consensus on the need for criminal legal services to be accessible and reflective of the diverse needs of the clients. The legal aid system needs to recognize the importance of taking practical, positive steps to ensure access for particular groups such as women, Aboriginal people, the physically and mentally disabled, youth, immigrants, persons facing a language barrier, and racial minorities. Failure to provide such access to legal services threatens not only the appearance of justice, but justice itself.

2. ISSUES RELATING TO THE DELIVERY OF CRIMINAL LEGAL AID SERVICES

Any delivery model for criminal legal aid services must take into account the many features that are unique to criminal litigation. The most important of these is the role and resources of the state in initiating and conducting prosecutions. This alone dictates that the delivery of legal aid be independent of government interference and of consistently high quality. A brief outline of some of the major issues in the criminal law area considered during our deliberations is presented below.

⁷ See W.A. Bogart, Colin Meredith, and Danielle Chandler, "Current Utilization Patterns and Unmet Legal Needs", Vol. II of this report. See also the Ontario Family Law Judges' Association and Ontario Judge's Association submission, *supra*, note 5.

⁸ Downtown Legal Services, submission to the Ontario Legal Aid Review (March 31, 1997) at 6.

(a) INDEPENDENCE OF COUNSEL

It is a cornerstone of our justice system that the defence of an accused person should in no way be, or be perceived to be, compromised by the authority that manages the prosecution. To this end, the private bar has traditionally provided a bulwark in maintaining the independence of the legal aid system. Through case representation, the provision of advice on policy- and priority-setting, or law-reform litigation challenging unfair encroachments on the rights of individuals, the private bar is an important check on state actions. Nonetheless, this natural check on government action can be maintained and augmented by salaried counsel as long as appropriate steps are taken to ensure that the legal aid authority enjoys a high degree of independence from government.

(b) CHOICE OF COUNSEL

Choice of counsel has been one of the distinguishing features of the Ontario legal aid system. The right to choose counsel gives the client the confidence to confide in and take advice from the lawyer, and adds to respect for the justice system. While choice may be important to some clients, and is supported by some lawyers and some economists, we do not feel that this is an absolute requirement of an effective and efficient system. The argument for choice of counsel rests on the assumption that clients are knowledgeable about their choices, that the lawyer chosen is in fact available to them, and that clients will choose wisely. In many cases, this is not so. Choice of counsel is often illusory. Clients often have no knowledge of the expertise of their chosen lawyer. They have neither the means nor the opportunity to determine the lawyer's competence, and assume that someone else (*e.g.*, the Law Society or the Plan) has ensured a level of competence.

We are of the view that limitations on choice, with accompanying quality controls, can replace the imperfect system of client knowledge with reliable and qualified counsel, and that, particularly in less serious matters, the extra confidence in the system which may flow from choice is not of central importance. Where a case is of lesser complexity and severity, the need for choice of counsel appears less compelling since the issues are more straightforward and the sensitivity of the matter for the client is reduced. For cases that do not require extensive preparation, alternative methods of ensuring competent representation can be established, while confidence in the system and in counsel must be a goal of all methods of service delivery.

(c) QUALITY ASSURANCE

Whatever the extent of client choices available, enhanced quality-assurance mechanisms must be in place for all lawyers so that clients will be able to resolve their cases with the confidence that their legal advocate is well qualified in the kind of case at issue and is skillfully representing their best interests.

In order that legal services of a consistently high quality are provided, performance standards must be established and vigorously monitored. In the judicare context, this would be promoted through requirements for controlled panel membership, adequate tariffs and preparation time, mentoring, mandatory continuing legal education, and access to research and other support services. With salaried staff, advanced methods common to an employment system can be put in place, such as supervision, performance evaluation, and educational and training programs.

Senior members of the bar (private and salaried) should play an important role in monitoring and updating these standards.

(d) TARGETING RESOURCES ON NEED

As discussed earlier, one of the goals of a legal aid system ought to be the constant evaluation of the legal needs of the clients whom it is designed to serve. Needs cannot be judged exclusively by the abstract gravity of the charge.⁹ Matters such as the personal circumstances of the accused, the extent and complexity of the evidence, the legal points at issue, the nature of the evidence, the position being taken by the Crown, and the impact of the charge on the client and on others are all relevant when difficult decisions about priorities for scarce resources have to be made. Lawyers and other service providers at the local level, and head-office officials, should provide ongoing support for the system's attempts to fully appreciate and meet those needs. The ability to identify particular legal concerns of communities seeking justice within the criminal justice system must form part of a client-focused approach, as must the capacity to engage in strategic litigation or to generate law-reform proposals for the relevant levels of government.

With, on the one hand, a limited amount of resources and, on the other hand, numerous and legitimate claims on limited legal aid resources, a legal aid system must have the capacity to identify the degree of representation appropriate for each applicant and the appropriate means to provide the services. Without reference to the particular facts of a case or the individual circumstances of the accused, hard- and fast- rules are likely to undermine a fair distribution of the limited resources. By contrast, a legal aid system that provides for early case assessment as to complexity and the required level of legal attention that is appropriate goes a long way towards providing an equitable system that can fairly set case-coverage priorities based on the financial, legal, and personal situation of accused persons.

(e) COST-EFFECTIVENESS OF DELIVERY MODELS

Proponents of the judicare model argue that the expanded use of salaried staff in the legal aid context will be more costly than the current system. As discussed in chapter 7, numerous variables, such as the level of the tariff, or the salary and case load of staff, result in this debate being less than conclusive. It is true that private counsel can choose to practise as frugally or extravagantly as they deem fit, and that they cover their own overhead. There can, however, be economies of scale in the shared resources of a Staff Office and localized expertise, and efficiencies in the planned and systematic use of non-

⁹

In a similar vein, the Criminal Lawyers' Association's submission to the Ontario Legal Aid Review, at 9 stated:

The difficulty is that on an individual basis, some person who might receive a 30 day jail sentence and as a result lose their employment could be affected more significantly than another individual who is unemployed, has been in jail before, and is unfazed by the prospect of a three to six month jail sentence. In this particular example, it is difficult to determine which is truly more serious. Accordingly, there must be some flexibility and discretion in the setting of priority guidelines to permit coverage for deserving applicants in particular circumstances. This flexibility must also include coverage in meritorious cases where there is no prospect of incarceration.

lawyers in the preparation of a case. At the very least there are advantages to introducing a mix of legal aid delivery mechanisms to provide efficiency incentives to service providers.¹⁰

(f) SUPPORT SERVICE CAPACITY

Lawyers doing legal aid work should have support services relating to legal research, policy development, mentoring and advice, investigation, social work, client placement, and so on. This will ensure that lawyers are focusing their skills on legal matters and are not duplicating one another's work. It will also assist in maintaining a high standard of legal aid service for clients across the province.

(g) APPEALS AND SYSTEMIC REFORM

The handling of criminal appeals and services for cases that raise systemic issues are important aspects of the legal aid system. They may result in procedural or substantive changes that secure individual rights or enhance system-wide efficiencies. Much of this work is legally complex and often relates to intricate *Charter* issues. Regardless of whether the lawyers delivering these services are salaried, on block contract, or part of the judicare panel, lawyers doing legal aid work should be providing effective representation of this nature.

3. PROPOSAL FOR A DELIVERY FRAMEWORK FOR CRIMINAL LEGAL AID SERVICES

We believe that the flexible and locally responsive model set out below provides a framework for the delivery of criminal legal aid services that will allow administrators of the legal aid program, service providers, and clients of the system to develop service-delivery options that can maximize the volume and impact of high-quality service within a variety of capped budgets. Simply stated, the model is designed to expand high-quality coverage in the most cost-effective manner.

This model proposes a flexible system that can be adjusted to meet competing demands. The level of funding of the system does not change the model. The structure allows the legal aid authority to draw the lines in the most efficient and effective way possible between those who do and those who do not receive particular types of services. If available resources change, the line can be fairly drawn in a different place as long as the priority-setting process we have discussed is respected. That said, any serious reductions in the current funding level will undermine the ability of the legal aid plan to address meaningfully the legal needs of many eligible accused persons and will also have a serious impact on the administration of the justice system.

(a) FRAMEWORK

Taking into consideration the principles discussed in the previous chapters and the case for a high-quality and competitive approach for the delivery of legal services, the following proposal outlines a model that can identify and assess the legal needs of those unable to afford legal services and can meet those needs appropriately, given regional and other differences in client needs and the reality of living within a capped budget. In our proposal,

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See ch. 7 of this report, which provides an in-depth discussion of the economic and quality-assurance issues relating to the choice of delivery models for legal aid services.

we envisage at the local level three distinct, but linked, functions in the delivery of criminal law legal aid services: managed intake, assessment, and straightforward dispositions; service options for complex cases; and appellate advocacy.

Under our model, there would be an emphasis on managing the early intake and case-assessment phase of the system. While complex matters would be referred to counsel for intensive work, simpler matters will be handled quickly and effectively within a managed structure. The system would be client-centred. It would assess the needs of the individual client and not simply focus on the kind of case or on abstract priorities. The model supports and encourages efficiencies from other parts of the system in order to achieve cost savings while, at the same time, expanding coverage beyond the current level for the same cost. It recognizes the need to have services and decision-making reflect local needs and conditions. It provides Area Directors with the ability to supervise quality assurance and provide consistency in eligibility determinations, and it builds in a strong role, including an oversight function, for the local criminal bar.

This proposal assumes that the impact of early intake, assessment, and resolution of less complex matters will result in efficiencies that will allow for the appropriate allocation of resources to more individuals and to more complex legal matters. The model allows for scarce resources to be allocated according to client needs.

Grounded in managed intake and case assessment at the local level, this approach would also provide provincial- or regional-level support to local service providers through central resources such as researchers, case workers, sentencing experts, supervised paralegals, criminal investigators, and interpreters, especially where numbers do not warrant this range of services in local offices. It would also provide a quality-assurance mechanism; policy development; priority-setting; and law-reform capacity.

(i) Phase One: Managed Intake, Assessment, and Straightforward Dispositions

The first stage of most criminal cases involves providing advice post-charge, at the time of arrest or summons or appearance notice, or speaking to bail at first appearance. At this stage, there is a need to start obtaining information both from the client and potential witnesses or sureties and from the Crown in order to assess the case and the client's circumstances. The client needs to be carefully interviewed within the first week so that the case can be assessed by the duty counsel office with a view to determining if there is evidence that needs to be preserved or witnesses who need to be interviewed quickly. Early Crown disclosure and screening are required to determine how the state is electing to proceed, whether it is amenable to diversion, whether bail will be contested, the strength and complexity of the Crown's case, the penalty being sought, and so on. Under our proposal, the emphasis at this point in the criminal process would be on identifying cases which do not require significant time or resources and resolving them quickly (*e.g.* through withdrawals, guilty pleas, and diversions). Those cases requiring more time, whether for investigation or the preparation of a sentencing plan, or anything more than a very short trial, would also be identified early and provided with access to appropriate services.

Overall, we envisage the managed approach to intake and assessment as providing enhanced services to clients, making court administration more efficient, and supporting the concept that legal aid is part of an integrated justice system, not only in terms of substantive

and procedural law reform, but also in terms of ongoing reform to the proper functioning of the criminal justice system. The model will make effective use of non-lawyers (*e.g.*, supervised paralegals to help with interviews or locate and advise potential sureties, specialists in finding and negotiating community placement options for accused persons seeking diversion or community service, trained investigators to follow leads and interview witnesses).

During the initial stage of the criminal process, the client may use the services of duty counsel (assisted by supervised paralegals) either by approaching them directly (as in the case of a bail hearing) or by referral from the intake office. Assistance could be obtained in the following areas:

- a thorough interview and case assessment
- provision of summary legal advice, and preservation of evidence
- bail
- adjournments and withdrawals
- obtaining charge-screening forms and disclosure
- entering into diversion programs (*e.g.*, alternative measures, adult diversion, mental health diversion, Aboriginal diversion, youth diversion)
- representation on guilty pleas and sentencing where this can be handled professionally with limited preparation
- where appropriate, pre-trial conferences

There should be a duty counsel office in each courthouse. Duty counsel services could be carried out by salaried or fee-for-service lawyers. Where these services are not provided by salaried counsel, duty counsel should be scheduled for block periods of time in order to maximize the likelihood of case continuity and consistency in dealings with clients and with other legal aid staff and justice system personnel. We can imagine, in some locations, Area Directors retaining experienced private-bar counsel to take on two-week to one-month rotations through the duty counsel program. This option is particularly viable where there is no local Staff Office with which salaried duty counsel could be associated, as we are concerned that long-term duty counsel placements, with no additional career opportunities or insufficient supervision, may reduce the quality of representation, even if performance measures are put in place.

This managed intake approach could work particularly well with the proposals now being considered to move towards a system of “out-of-court intake” for criminal law matters. In this approach, between the first appearance and the date in which a trial starts or a plea is entered, lawyers could proceed by phone, fax, e-mail, or telephone conference in relation to pre-trial issues. Providing legal representation is essential to making this work; doing so economically with a minimum number of service providers can help make it affordable and accessible to all.

A cost-effective duty counsel system could also ensure representation at jails, from which it is now possible to require an accused to deal with bail hearings and trial matters

that do not require the taking of evidence.¹¹ Given the problems of comprehending legal proceedings from a remote location, exacerbated where language or disability or unfamiliarity with the system is an issue, such duty counsel services at the jails themselves may well be essential to justice being done in these new circumstances,¹² and thus to the state's legitimate use of these measures.

Duty counsel may be supported by case workers, who would be able to assist in coordinating sureties and diversion, interviewing witnesses, providing general information, and appearing as an agent (if appropriate). For instance at the bail stage, a bail interview officer (as described in the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*)¹³ could be hired by legal aid to meet and assist accused persons, witnesses, and persons who might give evidence or act as sureties for them, prior to their meeting with duty counsel.¹⁴ At the diversion stage, case workers who are well qualified in preparing community placement plans could assist duty counsel by linking adult and youth offenders to community resources and negotiating placements. The use of such non-lawyer resources would meet the needs of clients and relieve some of the strain on the duty counsel system by addressing issues which are not purely legal. This would also assist the court to make more informed dispositions with respect to bail and sentencing.

With the exception of trials, many of these preliminary services can be provided without the expense of financial-eligibility assessment. Having duty counsel (assisted by non-lawyer case workers) manage the early stages of criminal proceedings saves legal aid costs and moves the accused person through the system more quickly because there will be less delay in receipt of legal aid and, thus, fewer adjournments, and because more can be accomplished out of court or by negotiations with the Crown. However, we believe that the Area Director and his or her staff should, at their discretion, be able to assess people at any point in the process where there is good reason to believe that the person can afford to retain private counsel, and legal aid would spend more money on the client than it costs to do the actual assessment. It is anticipated that in most cases this will arise at the point where there has been Crown disclosure and charge screening such that a determination of the complexity of the legal issues can be made, but it could occur earlier (when, for example, a complex bail hearing is contemplated).

At the stage at which financial eligibility is tested and established, the Area Director (perhaps on the advice of duty counsel) will assess the client's case to evaluate how much preparation will be required, how complex the matter will be (*e.g.*, number of witnesses, use of expert evidence, available defences, legal issues, number of accused), and, in light of that and other factors (such as the expertise and case load level of duty counsel, and conflict of interests), will determine whether the case is one that can be prepared within the time

¹¹ *Criminal Code*, ss. 515(2.2), 650(1.2), 672.5(13).

¹² These provisions (*Criminal Law Improvement Act 1996*, S.C. 1997, c. 18) came into effect on June 16, 1997.

¹³ Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, December 1995) at 159.

¹⁴ Accused persons facing a criminal charge covered by s. 469 and s. 522 of the *Criminal Code* are entitled to have a fuller range of service options available to them at the time of arrest, given the relevant provisions of the *Criminal Code*.

available for duty counsel or whether the client should be provided with a choice of service delivery.

We recommend that the private bar should be involved in setting guidelines for when a case ought to be referred out of the duty counsel office. These guidelines are important because we are suggesting a model that replaces the criteria of risk of incarceration by a more case-specific analysis. In so doing, we hope to extend legal representation to more accused persons than at present, based, in part, on the assumption that not all cases that have a risk of imprisonment are legally or factually complex, nor necessarily require an extensive time investment by a lawyer. As a result, the legal aid authority will be handling a more diverse mix of cases through the duty counsel program (supported by non-lawyers) which will save administrative and legal costs, reduce court delay, and support more clients more effectively.

The bar should also work with the Area Director to monitor and assist duty counsel to ensure that clients are obtaining quality legal representation through duty counsel and that individual lawyers' case loads are appropriate. Traditionally, the private bar has provided invaluable assistance to the duty counsel program throughout the province. This model envisions continued close cooperation between the private bar and the legal aid administrator in the local area.

Importantly, at any point during the intake management of a case, exceptional matters could be assessed to be of such obvious complexity that they need not proceed further through the intake and assessment phase, but rather the client (once found financially eligible) should have immediate choice of counsel.¹⁵ These exceptional cases will be identified by the Area Director, duty counsel, or other intake staff, and will then be immediately referred to the client's choice of service provider.

(ii) Phase Two: Increasing the Service Options for Complex Cases

Against the background of the discussion in chapter 7 concerning the importance of competition between delivery models (especially in relation to complex cases) and the desire to maintain a vibrant private criminal bar, those matters that have been referred to Phase Two of the proposed model will trigger the ability of the client to choose his or her own counsel.

The range of service-delivery options will depend on what can be made available locally. In all locations, the option of retaining a lawyer from the private bar will be available if the bar is willing to provide such services. Some parts of the province will be able to offer other choices, depending on client needs and local feasibility. Other choices available to the accused may include counsel from a local Staff Office or counsel working on a block contract.

Thus, in smaller communities, it is possible that the system will consist only of part-time staff to discharge the intake/assessment function (with advice from a larger office, as necessary), with the rest of its services provided through contract duty counsel and judicare. In a mid-sized community, there would be a full-time staff to manage the intake system, possibly staff as well as contract duty counsel, plus judicare, and, possibly, a Staff Office.

¹⁵ As, for example, in murder cases. See, *supra*, note 14.

In larger centres, we recommend a fully managed intake system, staff duty counsel, a Staff Office for trials and appeals, as well as the continued availability of judicare. Block contracts may be an option in some areas where they would improve access to local expertise.

a. Judicare

Judicare would remain much the same as it is now, but we recommend that there be more extensive use of case-management plans, rigorous standards for admission to a panel, more supervision and quality control, and access to more staff resources (e.g. investigation, translation, and case-work services from a local Staff Office; research and training materials from the provincial head office).

b. Staff Offices

Staff Offices, where available, would provide an alternative method for the delivery of legal aid services. Consistent with our view of locally developed service delivery, the make-up of a Staff Office should reflect the particular needs of the community it is serving. Generally, we envisage the office being staffed with a range of persons to support the work of staff counsel and duty counsel, which could include case workers, bail officers, social workers, community workers, criminal investigators, and translators. The office should be in an accessible location, in terms of both the court and the community it serves. In the largest centres, satellite offices would be used to improve access through a small intake, assessment, and advice staff complement, relying on the resources of the main, local Staff Office for other services.

The Staff Office should be linked to the operations of the duty counsel program, both in terms of career-development opportunities for lawyers and non-legal case workers, and in terms of the sharing of legal support services. It is an important component of our model that duty counsel be provided with career opportunities outside of the duty counsel program. Movement within the system will avoid career stagnation and will allow duty counsel to bring important legal experience and negotiation skills to the duty counsel role.

Lawyers employed by the Staff Office could perform a range of functions, including both trial and appellate advocacy (see below, Phase Three). Responsibilities may be rotated, depending on skill, expertise, and seniority. This would enhance educational development, minimize "burn-out", and create a sound career path for those counsel who seek to remain in the Staff Office for a significant period of time. The office may also provide counsel with the opportunity to participate in systemic law-reform cases. As with the private bar, educational and quality-control programs should be put in place to ensure high-quality performance of staff lawyers, as discussed in chapter 7.

Legal aid clients who have chosen to use the Staff Office would be able to request that they be represented by a particular lawyer, subject to staff availability and workload. Staff clients would be able to change lawyers only in the same limited circumstances that are permitted for judicare. Once retained, the staff counsel will have a solicitor-client relationship with the individual clients and would be required to meet their clients' legal needs just as judicare counsel do.

Case-load standards must be established by the central office to prevent overload and poor service. This goal should be supported by the involvement of the local bar in assisting and advising on the operation of the Staff Office.

Staff Offices would work closely with head office to enhance the research and training programs for all lawyers doing legal aid across the province.

c. Block Contracts

As discussed earlier in chapter 7 of this report, blocks of cases could be tendered out to private lawyers. While this form of contracting is controversial, it may be possible to utilize this tool to enhance access to services in remote locations and to improve the quality of service and expertise of the local bar with respect to particular kinds of cases or clients. Details of this method of service delivery, and the necessary safeguards to ensure that any cost savings are not gained at the expense of service quality, ought to be developed by the legal aid authority as part of its ongoing responsibility to evaluate new and innovative delivery models for legal aid services. Outside of contracted duty counsel services, clients should always have a choice between contract counsel and, where available, private counsel on a certificate.

d. Case Management

All cases that proceed through judicare or the Staff Office will be subject to case-management standards. A budget will be set at the outset of the case (often this will be done for generic categories of cases) and will provide defence counsel with the parameters of the "retainer". This will provide the legal aid authority with the tools to monitor case expenditures closely. Moreover, this arrangement reflects the concept of funding legal aid cases at a level similar to what a client of modest means might expect to pay.

(iii) Phase Three: Appellate Advocacy

Appellate advocacy will be handled either locally or centrally, depending on the types of appeal. First, local Staff Offices, along with lawyers in private practice, will have an appellate capacity in relation to summary conviction appeals. Unlike indictable offence appeals, these appeals are heard by judges of the General Division, often at the local level. They are becoming increasingly more prevalent due to recent *Criminal Code* reforms that give the Crown the option to proceed by summary conviction in increasingly more serious matters.

Appeals to the Court of Appeal will be approved at the provincial level. Some cases will be handled by the private bar, possibly in part through block contracts. Others will be handled by a specialized Staff Office (much like the existing Crown Law Office—Criminal) that provides high-quality and efficient advocacy, offers a highly skilled environment for training and supervising counsel in this specialized area of practice, and serves as a resource for the rest of the system.

Clients will continue to have choice of counsel (e.g., either private bar, staff, or block contracts, where available).

Summary conviction appeals will be authorized by the Area Director. Appeals to the Court of Appeal for Ontario or Supreme Court of Canada will be authorized by the Provincial Director or his or her designate.

(b) INTERNAL REVIEW

Where the Area Director makes a determination about whether a case is covered or whether to retain it in the duty counsel system, an appeal of that decision could be taken to the local Area Committee. Where there is a decision that it is not appropriate for a client to change his or her counsel, an appeal could also be taken to the Area Committee. Where there is a decision by the Area Director to strike a lawyer off the local legal aid panel, an appeal could be taken to the Provincial Director. The Provincial Director's decision not to authorize an appeal to the Court of Appeal for Ontario or the Supreme Court of Canada would be reviewable by a subcommittee of the governing authority.

(c) DEFENCE BAR ADVISORY COMMITTEE

In order to ensure that the intake and assessment services function well and that the case load of duty counsel and the Staff Office is set at a reasonable level, and to ensure that local criminal legal aid services are being provided competently and meeting client needs, we suggest that there be a Defence Bar Advisory Committee made up of members of the local criminal bar who will assist the local Area Director or senior officials within the legal aid administration in the following ways:

- advising on guidelines for the Area Director in relation to discretionary decisions;
- advising on law and procedural reforms; and
- advising on case-management standards, quality assurance and mentoring programs.

(d) YOUNG OFFENDERS

The legal and social issues governing the delivery of legal aid services to young offenders are distinct from those relating to adult offenders. Under the *Young Offenders Act* (YOA), youth are guaranteed legal representation before the courts. Moreover, youth can be distinguished from adult offenders in that they are a vulnerable group who require specialized resources to support them when they confront the justice system. It is recognized that the problems of young offenders are often multifaceted and that there is often a range of responses available.

With this in mind, it is our view that the delivery of criminal legal aid services to young offenders should be structured similarly to that described above for adults, but that there should be local recognition and accommodation in the design of the range of services offered. Legal services to youth should reflect the particular needs of that group. For instance, the role of the case workers supporting lawyers in relation to bail proceedings may have to be adjusted to reflect the difficulties youth sometimes have in finding housing to support their release on bail. Similarly, the case-worker support or tariff structure for youth offences may have to accommodate the increased potential for diversion for youth or the additional work required for developing a sentencing plan for young offenders.

Lawyers working with youth should be skilled in the area of YOA proceedings and alternatives. This could be assured through a specialized Staff Office for young offenders or a special branch of the main Staff Office. In relation to judicare service delivery, there should be a specialized panel of YOA lawyers trained and evaluated in relation to this area of expertise.

To the extent that these matters are related to other family law matters (*e.g.* child protection), having a separate structure for young offender proceedings, especially within the Staff Office, should allow the lawyers or case workers to collaborate more closely with the family law Staff Office or with judicare counsel in related family law matters.

Under our model, young offender cases will be managed during the intake and assessment stage by the Area Office in conjunction with duty counsel and his or her staff. Choice of service-delivery option would not be given until it has been determined by the Area Director that the particular case is incompatible with the level of service that can be provided professionally by duty counsel. As with adult criminal cases, once the case is determined to be of the necessary complexity to trigger choice of counsel, a range of delivery options (depending on local availability) will be offered to the youth. All youth cases will be eligible for duty counsel coverage in accordance with the statutory right to counsel.

4. THE NEED FOR AN INTEGRATED JUSTICE STRATEGY FOR CRIMINAL LAW SERVICES

Crown screening is an example of an initiative that is consistent with and, indeed, required for an efficiently run legal aid system. Crown screening is a Ministry of the Attorney General policy imposing a requirement on Crown Attorneys to screen charges and to proceed only in cases and charges on which there is a “reasonable prospect of conviction”. Before a case arrives in Provincial Court, a Crown Attorney should review the file to determine whether to proceed, and on what charges, whether the case requires a pre-trial, and whether the charge is suitable for diversion, and, if not, what the Crown election will be and what penalty will be sought. This then allows legal aid to make an early determination of whether the case fits into its priorities, subject to review when disclosure is made.

Our consultations across the province revealed that Crown screening practices vary considerably from courthouse to courthouse. Statistics demonstrate that guilty pleas and withdrawals still often require numerous appearances.¹⁶ If Crown screening were being carried out effectively, (*e.g.* within the set time frame and with an indication of the Crown election and sentencing being sought), the number of court appearances in relation to guilty pleas and withdrawals should be dramatically reduced. One explanation for the reduced impact of charge screening to date is that it is not consistently conducted by senior Crown Attorneys. It is suggested that more junior Crowns may be reluctant to make binding decisions to dispose of a case at first appearance.

Charge screening is also intended to identify suitable cases for alternative punishment or diversion. These are informal processes of resolving a case without the need to have the matter addressed in court and without the result of having a conviction registered for a criminal offence. There are currently no explicit policy guidelines for the alternative punishment program; rather, this determination is left to a prosecutor’s discretion. As with Crown screening, leaving this process in the hands of junior Crowns may well result in fewer minor charges being diverted, and more costs incurred by legal aid and the justice system as a whole.

The value of properly screening all charges and of diversion cannot be overstated in terms of controlling justice system and legal aid costs. Timely and early disclosure by Crowns is also

¹⁶ See Alan N. Young, “Legal Aid and Criminal Justice in Ontario”, Vol. II of this report.

essential to our model. If both the Crown investment strategy and our managed intake and assessment phase are properly implemented, it would ensure that scarce legal aid resources are focused only on those charges that remain after early Crown and legal aid case screening has taken place.

One must also consider that a major change in sentencing policy was effected in 1996 with the enactment of conditional sentences. Bill C-41¹⁷ indicates a major shift away from reliance upon custodial sanctions. Section 717 of the *Criminal Code* provides the first ever codification of the need for alternative measures (diversion). Section 718.2(d) provides that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and section 742.1 (conditional sentence) allows an offender to serve an imposed custodial term of less than two years in the community if the court concludes that serving the sentence in the community would not endanger the safety of the community and is otherwise consistent with the sentencing principles set out in the *Criminal Code*. Parliament has now provided the framework for innovative sentencing practices, and the Criminal Law Division of the Ministry of the Attorney General should respond by providing directives to prosecutors as to when a case should be considered suitable for a non-custodial disposition.

In short, if charge screening, early and timely disclosure, diversion, and conditional sentencing are effectively implemented and administered consistently by all Crown Attorney offices, there would be significant savings for the legal aid system. If these practices are not put in place, it will greatly increase the cost and reduce the operational efficiencies not only of our model, but of the criminal justice system as a whole.

5. RECOMMENDATIONS

1. The legal aid authority should continue to seek a high level of cooperation and participation from the private bar in relation to the delivery of criminal legal aid services.
2. The legal aid authority should implement a flexible and locally responsive model for the delivery of criminal legal aid services that will allow administrators of the legal aid program, lawyers and other service providers, and clients of the system, to develop service-delivery options that maximize the volume of high-quality service that can be sustained within a capped budget.
3. The legal aid authority should develop an effective way of assessing prospective criminal law clients' needs as individuals and of setting priorities among those needs based on the impact of the provision or the withholding of services in the circumstances.
4. The delivery of criminal legal aid services should have three components: managed intake, assessment, and straightforward dispositions; service options for complex cases; and appellate advocacy.
5. The structure of service delivery for Phase One—Managed Intake, Assessment, and Straightforward Dispositions—should be as follows:

¹⁷

S.C. 1995, c. 22, s. 6.

- (a) The responsibilities of the Area Directors should include:
 - (i) the development of a comprehensive and managed approach to intake and case assessment; and
 - (ii) the use of duty counsel to assist clients in relation to summary legal advice, adjournments, bail hearings, withdrawals, straightforward guilty pleas and sentencing, Crown screening, Crown disclosure, pre-trial conferences, and representation on trials requiring limited preparation.
- (b) There should be a duty counsel office in each courthouse. Duty counsel services should be provided by salaried or fee-for-service lawyers available for four week-rotations at a minimum. Duty counsel services should be provided at correctional facilities in order to take advantage of recent changes to the *Criminal Code*.
- (c) With the exception of trial representation, these preliminary services should normally be provided without the expense of an eligibility assessment. However, the Area Director, and his or her staff, should, at their discretion, be able to assess people at any point in the process where there is good reason to believe that the person can afford to retain private counsel and legal aid would spend more money providing service to the client than it costs to do the actual assessment. This would normally occur at some point before a trial occurs.
- (d) In a case where a successful financial assessment is completed, the Area Director or his or her designate should:
 - (i) assess the client's case to evaluate how much time will be required to prepare the case effectively to ensure trial fairness, and
 - (ii) determine whether the case is one that can be prepared within the time available for duty counsel, or whether the client should be provided with choice of service delivery.
- (e) The guidelines used by the Area Director or his or her designate to determine the appropriate service-delivery mechanism for a particular case should be developed in conjunction with the private bar. The private bar should also work with the Area Director to monitor and assist duty counsel to ensure that clients are getting quality legal representation from all parts of the criminal legal aid system.

6. The structure of service delivery for Phase Two—Service Options for Complex Cases—should be as follows:

- (a) The client should be provided with choice of counsel. Service delivery may be available through the private bar, through local Staff Offices, or from counsel working on block contracts.
- (b) The design mix for the delivery of criminal legal aid services in each locale should be proposed at a local level (and approved by head office) having

regard to client needs, including geographic, linguistic, and other special needs.

- (c) Where both appropriate and feasible, Staff Offices should be set up to provide criminal legal aid services in communities across the province. The offices should be staffed with a range of persons, including lawyers and case workers (*e.g.*, supervised paralegals, bail officers, social workers, community workers, criminal investigators, and interpreters). The operation of the Staff Office should be linked to the duty counsel program.
- (d) Lawyers employed by the Staff Office should perform a range of functions, including advice counsel, trial counsel, or appellate counsel. Responsibilities may be rotated within the office, depending on range of expertise and seniority. Salaried duty counsel staff should also have access to internal rotation opportunities within the Staff Office.
- (e) Clients of the Staff Office should, where feasible, be able to request choice of counsel within the office.
- (f) All cases referred beyond the early managed intake phase to either private bar or Staff Office counsel should be subject to case-management standards.

7. With respect to Phase Three—Appellate Advocacy—all appeals to the Court of Appeal should be approved at the provincial level and supported by a central research facility. Summary conviction appeals should be handled by the local Staff Offices or by local practitioners on certificate or block contract.
8. The services provided by private lawyers, staff lawyers, duty counsel, and other staff should be subject to appropriate quality-assurance mechanisms. Standards should be set for lawyers wishing to be on panels to accept legal aid certificates.
9. Area Directors should be responsible for supervising quality assurance (including controlling panel membership), providing consistency in eligibility determinations, building strong local-bar input into the delivery of criminal legal aid services, and ensuring that client needs are being met appropriately.
10. Provincial or regional support from the legal aid administration should be made available to local service providers through: dedicated research and other non-legal support services, quality-assurance programs, policy development, and law-reform capacity.
11. A Defence Bar Advisory Committee should be set up in each community, made up of members of the local criminal bar who will provide assistance to the local Area Director or senior officials within the legal aid authority:
 - (a) advising on guidelines for the Area Director in relation to discretionary decisions;
 - (b) advising on law and procedural reforms; and
 - (c) advising on case-management standards, quality assurance and mentoring programs.

12. The structure of service delivery for young offenders should be as follows:

- (a) The delivery of criminal legal aid services to young offenders should be similarly structured to that described above for adult offenders, but there should be local recognition and accommodation in the design of the range of services offered to reflect the special issues arising in regard to youth and children who become involved in the criminal justice system.
- (b) Lawyers working with youth should be knowledgeable in the area of Young Offenders Act proceedings and related community services, and should meet appropriate performance standards set by the legal aid administration.
- (c) All youth cases should be eligible for duty counsel coverage in accordance with the statutory right to counsel, and those cases determined to be of sufficient complexity to trigger choice of counsel should receive a choice of service-delivery options (as available in their community).

13. Community clinics should not be used to provide criminal law legal aid services directly, except in exceptional circumstances, although criminal Staff Offices should consider co-locating with, or locating near, community clinics.

14. Where the Area Director makes a determination about whether a case is covered or which delivery model is appropriate, the Area Committee should hear appeals from such determinations. Where there is a decision that it is not appropriate for a client to change his or her counsel, an appeal could also be taken to the Area Committee. Where there is a decision by the Area Director to strike a lawyer off the local legal aid panel, an appeal could be taken to the Provincial Director. The Provincial Director's decision not to authorize an appeal to the Court of Appeal for Ontario or the Supreme Court of Canada would be reviewable by a subcommittee of the governing authority.

15. Charge screening, early Crown disclosure, diversion, and conditional sentencing should be consistently and effectively put into place across the province by the Crown to match the early intake and assessment procedures recommended in relation to the delivery of criminal legal aid services.

FAMILY LAW LEGAL AID SERVICES

In this chapter we analyze the current models utilized for delivering family law legal aid services in Ontario and make several recommendations for their reform. The chapter begins with a brief description of the nature of, and need for, family law legal aid services and the current context in which these services are delivered. We then analyze the relative strengths and weaknesses of alternative delivery models for delivering family law legal aid services and outline a series of principles which we believe should guide the design of family law legal aid services in the future. We conclude this chapter by proposing a multifaceted, flexible model for delivering family law legal aid services which we believe will provide for sophisticated assessment of individual cases, early legal intervention in those cases, the provision of legal and non-legal assistance based on a prioritization of family law legal needs, and the coordination of the legal aid system with appropriate non-legal community service providers.

1. THE NATURE OF FAMILY LAW DISPUTES AND THE NEED FOR FAMILY LAW SERVICES¹

Family law attempts to provide an orderly and fair process for resolving family law disputes. Family law is “a system which can bring order to the chaos of domestic separation, one which can provide a means of resolving intensely competing personal demands in an equitable, rational, civil and non-violent way.”² The legal needs generated by the modern family law process are therefore, in large part, claims for legal assistance in reaching settlements that are informed, voluntary, and durable.

Family law requires people to use the legal system if they desire a binding solution to matters they are unable to resolve themselves. Effective access to the entitlements and remedies provided by the family law system requires legal assistance, which in the case of low-income individuals means legally aided assistance. The claim for an entitlement to legally aided services in family law matters rests on three factors: the complexity of the state-enacted legal regime; the significance of the interests that legal regime has been put in place to protect; and the potential for significant power imbalances between the parties to family law disputes.

¹ Much of the discussion in this chapter relies upon the work of Professors Brenda Cossman and Carol Rogerson and the background study they prepared for the Review. See Volume III of this report.

² Ontario Family Law Judges’ Association submission to the Review at 12.

Family law is exceedingly complex and subject to frequent legislative amendment. Specific legislative provisions relating to family law include the *Divorce Act*,³ the *Children's Law Reform Act*,⁴ the *Family Law Act*,⁵ the *Family Responsibility and Support Arrears Enforcement Act*,⁶ and *Child and Family Services Act*,⁷ the *Canada Pension Plan Act*; and the *Pension Benefit Act*. The complexity of family law is compounded by the fact that most legislation in this field is comparatively recent.

Moreover, it is often difficult to determine just how conflictual and/or complex a family law case is likely to be. The progress of a family law case is very much a product of the approach of one or both of the parties. The complexity of a case is often a direct result of the degree of conflict in the parties' relationship. Clients will often not reveal crucial information until a relationship of trust has been developed with the lawyer. In this respect, family law is very different from criminal law, where the charges and the overall outline of the matter are usually known once the Crown has disclosed its case and the client has been interviewed. In family law, the legal issues are often not well defined in advance and must be determined as the matter proceeds. Similarly, circumstances may change if the attitude of one or both parties changes during the course of the proceeding.

Like criminal law, family law addresses issues of serious importance to individuals and society as a whole: In cases involving abuse, fundamental issues of bodily integrity and physical and psychological liberty are at stake. In child protection cases and many custody and access cases, the very existence of the parent-child relationship is at risk. Stable and safe custody and access arrangements for children after their parents' relationship has broken down is vital to the physical and psychological well-being of children. Support obligations are crucial determinants of a parent's and child's financial security. Support enforcement proceedings entail the risk of incarceration, and will soon include the possible loss of a driver's licence. Even uncontested divorces and adoptions involve important issues of formal legal status that determine a host of other legal entitlements and obligations.

Finally, the parties to family law disputes often encounter significant power imbalances. For example, child protection cases pit child-welfare agencies against parents. In the family law system, women who seek legal aid often have few financial resources when they confront their husbands, who have the financial resources to hire private lawyers to vigorously defend their interests. Many women's vulnerability in these situations is compounded by the disempowerment they have suffered as a result of abusive relationships.

Many of these issues—legal complexity, seriousness of consequences, and power imbalances—have a corollary in criminal law. As well, family law mirrors criminal law in

³ Just recently, the federal government introduced a complex new system for the assessment of child support. *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act*, S.C. 1997, c. 1.

⁴ S.O. 1982, c. 20, now R.S.O. 1990, c. C.12.

⁵ S.O. 1986, c. 4, now R.S.O. 1990, c. F.3.

⁶ S.O. 1996, c. 31. The legislation received royal assent on December 19, 1996, and was proclaimed in force May 7, 1997. The legislation will repeal and replace the *Family Support Plan Act*.

⁷ Enacted as S.O. 1984, c. 55, now R.S.O. 1990, c. C.11.

one other important respect—much of the litigation in family courts is generated by the state. The state is a significant player within the family law system, particularly as that system touches low-income persons. The state initiates proceedings in order to protect its financial interest in controlling the costs of social assistance (given the strong linkage between default in support obligations and social assistance costs).⁸ The state has also largely assumed responsibility for enforcement of support through the Family Responsibility Office (formerly the Family Support Plan). The state and its agents are active participants within the family law system, acting to protect what are deemed to be significant social interests at stake in cases of family breakdown, including, but not limited to, child protection proceedings. Provincial Family Court Judges estimate that 50 per cent of the litigation in their courts is generated by institutional litigants.

We endorse the views of Professors Cossman and Rogerson on legal needs in family law matters:⁹

There are no simple answers or quick-fix solutions to the problems of family law. Family law needs are complex, multidimensional and extremely widespread. Individuals with family law problems need legal assistance. There is no way to finesse the fact that family law problems are legal problems and need legal assistance. Family law cases vary enormously in their complexity, and the degree of conflict and power differentials between the parties, in ways that defy easy categorization and initial assessment.

2. CONTEXT

As of 1990, the Plan provided fairly broad and comprehensive coverage of family law matters. If the financial-eligibility rules were met, certificates were available for a wide range of family law matters, although it was not always easy to find a lawyer willing to accept a certificate. Throughout this period, family law services were delivered almost exclusively through the judicare program. In the 1980s, the Plan began some innovative programs to deliver family law services more effectively, including its Victims of Spousal Assault Program,¹⁰ funding of mediation services, legal aid Settlement Conferences, and the institution of a “Green Form” program.¹¹

As discussed earlier in this report, in the early 1990s the Plan came under increasing pressure to control costs. In the family law field, the Plan took two steps. The first was to

⁸ Social assistance recipients are required, as a condition of entitlement to benefits, to pursue all private sources of support. Although the support applications are typically brought in the name of the social assistance recipient, the proceedings are prompted and monitored by representatives of the municipal welfare agency or the Ministry of Community and Social Services (COMSOC). See the Toronto Region Family Courts Committee, “*Report of the Working Group on Unrepresented Litigants*”, March 1997, brief submitted to the Review.

⁹ See Vol. III of this report.

¹⁰ See Law Society of Upper Canada, Ontario Legal Aid Plan Annual Report 1986 (Toronto: Law Society of Upper Canada 1987) This program authorized institutions or agencies, such as women’s shelters, to conduct a simple financial eligibility test using special forms, which then allowed a qualifying woman to receive two hours of legal advice from the lawyer of her choice, who would be paid by the Plan at duty counsel rates.

¹¹ The “Green Form” was a pilot project established in 1988 in the District of Waterloo, modelled on a system in England, which allowed lawyers to determine the financial eligibility of clients and provide them with up to four hours of legal advice on any matter excluding real estate matters. In Waterloo almost half of the completed cases involved matrimonial matters.

expand its successful Settlement Conference program.¹² The second was to consider alternative models of delivering family law services. In November 1993, the Law Society approved two family law pilot projects—a limited-service Staff Office focusing on uncontested divorces and adoptions, and a full-service judicare-equivalent Staff Office. In June 1994, the Law Society approved a third pilot project—a Women's Family Law Centre that would focus on the legal and non-legal needs of abused women.

Of the three pilots, only the first, the Divorce Law Office, has opened, although with a significantly reduced mandate.¹³ The two remaining pilots were never implemented, even though the September 1994 Memorandum of Understanding provided that the Law Society would “continue to implement and evaluate the legal aid pilot projects approved by Convocation as of May 1994”. In June 1995, a new provincial government was elected into office and, following some uncertainties regarding the future of the Plan, the other pilot projects were put on hold.

In April 1996, the Law Society imposed tariff cuts and a prioritization regime on both criminal and family certificates. Many argued that the implementation of these measures meant that family law services had suffered a “double cut” in relation to cuts to criminal services.¹⁴

Under the new tariff which came into effect in family law, there were substantial reductions in the maximum billable hours allowable for family law matters. The basic allotment for family law proceedings and negotiation of domestic contracts, for example, went from a maximum of 15.0 hours to 6.5 hours, although additional hours are available in some circumstances.

The prioritization regime was intended to ensure that certificates were allocated to the most serious matters, and then in descending order of priority, until the available allocation of certificates was exhausted. As part of this exercise, some services were eliminated completely, notably divorces, except in cases of undue hardship; adoption; and change of name.

Priority One cases were determined to be those which involved “protecting the safety of a spouse or child who is at risk, or protecting an established parent/child bond (custody/child welfare)”. Included in this priority were: (1) most child protection matters except for voluntary care agreements; (2) certain custody matters (including cases where the safety of a spouse or child, or an established parent-child bond is at risk or threatened,

¹² By 1993, the demand for the conferences outstripped the ability of Area Directors and staff lawyers to provide the service. The Plan therefore expanded the program by training members of the private bar to assist Area Directors by conducting Settlement Conferences in five locations—Toronto, London, Windsor, Ottawa, and Hamilton. The numbers of Settlement Conferences conducted by the Plan has continued to grow every year. The number of Settlement Conferences has risen from 876 in 1992/93 to 4,049 in 1995/96.

¹³ The Divorce Law Office opened in March 1995. Shortly afterwards, however, the Plan's coverage of uncontested divorces and adoptions was significantly cut back. As a result, this project was significantly cut back. The Divorce Law Office now handles most of the limited range of uncontested divorces for which the Plan issues certificates.

¹⁴ The April 1996 cuts were implemented on the principle that they would be shared equally by each of the areas of law. The fact that family law had already been subjected to cuts in the number of its certificates and its costs through elimination of uncontested divorces and reduction in the hours for support variations was ignored—hence the claim that family law suffered a double cut.

including the threat of kidnapping, and relocation where the parent-child bond is threatened; cases of sexual abuse; and cases where the parties are separating and no status quo has been established); (3) support matters where spousal or child support is essential to maintaining the parent-child bond or to ensure the necessities of life; (4) applications for access or variation of access where there is an allegation of assault or abuse; and (5) property cases involving the issue of exclusive possession where there are safety or abuse issues.

Priority Two covered custody variations where there is no emergency; initial applications for access to maintain an established parent-child bond; child or spousal support when custody has changed; support variations subject to a cost-benefit analysis; and support enforcement, if there is merit.¹⁵ Property cases involving preservation of property in the face of risk of dissipation, such as a spouse's business, also fell within this priority.

The Plan also established three other priorities, dealing with a variety of less serious matters.¹⁶

At first, it was expected that the Plan would be able to grant 29,000 family law certificates in 1996/97, effectively covering both Priority One and Priority Two matters. This estimate was based on historical averages, which included a mix of complex and less complex cases. The estimated number of family law certificates was revised downward when it became clear that the most serious and complicated cases were also the most costly. As a result, in 1996/97 the Plan issued only 14,063 family law certificates. As a practical matter, certificates were available only for first priority matters. The contrast with previous years is striking. In the fiscal year 1993/94, 65,691 family law certificates were issued in the province. The number of family certificates has dropped to levels not seen since 1970.

The Plan has since acknowledged the severity of the impact of these measures on family law services and taken some corrective action. Approximately an additional \$10 million annually for the next two years is being dedicated to family law. These funds will be used to increase the coverage of family law matters (including Priority Two cases) and to increase billable hours on the more complex cases.¹⁷ The Plan is also expanding its duty

¹⁵ March 1996 Law Society announcement at 14-15.

¹⁶ Priority Three covered support applications and variations involving recipients of public assistance; custody cases involving mobility rights and relocation where the parent/child bond is not threatened; Hague convention cases, and cases where a change in the status quo of the parties is proposed but there are no aggravating factors or problems in the status quo; and access cases where there is denial of access or contempt, or a proposed change from supervised to not-supervised access. Property cases involving unliquidatable assets or an income stream in expectation, such as pensions, were also covered here, as were child protection cases involving voluntary care agreements. Priority Four covered child protection cases where the issue was access by family members offering to care for the child; custody cases where there is no real issue but an order is requested; and access cases where there is a request to shift from daytime to overnight access.

¹⁷ First, for the current fiscal year, that is, 1997/98, certificate coverage will extend to Priority Two cases. The main effect of this will be to extend coverage to initial applications for access. Second, the amount of money available for discretionary increases in fees in family law cases has been doubled. Third, Area Directors will be authorized, in difficult cases, assumed to be about 10 per cent of the case-load, to grant the time/issue allotment for the main issue twice. (This does not apply to child protection matters.)

counsel services, with the objective of providing family law clients with more assistance in the form of advice and review of documents before they go to court.¹⁸

3. CURRENT LEGAL NEEDS

The cuts to legal aid in family law occurred at the same time that other services available to assist low-income family law litigants were also being cut because of budgetary pressures. These cuts, which intensified the impact of the legal aid cuts, include: services for abused women, the Office of the Children's Lawyer, court intake workers, and programs providing service of family court documents.¹⁹

The cuts to family legal aid services have had severe consequences on several levels. Many women who do receive a certificate have increased difficulty finding a lawyer who will accept it. Even after a woman finds a lawyer, the hours allowed on the certificate may run out with much more work remaining to be done. Finally, coverage remains uneven, even in the most serious cases involving abuse and threats to the safety of children, notwithstanding the clarification and expansion of coverage by the Plan in 1997/98.

The majority of low-income persons with family law cases who do not receive certificates would appear to be abandoning their claims, agreeing to whatever their former spouse or the state demands, or entering the family law system unrepresented. Many of these litigants are dealing with serious issues of support, custody, and access. Because the parties have had no legal advice, they are unaware of the important legal, procedural, or evidentiary issues at stake in the proceeding. Pleadings and affidavits are often inadequately prepared. Unrepresented litigants are often reluctant to raise issues of violence in their pleadings. At the same time, lack of representation reduces settlement rates. Many cases that would have been settled if the parties had had lawyers now go to court.

The only legal assistance available to most unrepresented litigants is provided by duty counsel.²⁰ Even then, duty counsel are not available to parties in proceedings in the Ontario Court (General Division), where a number of important family law issues are dealt with. In

¹⁸ This is being accomplished through expansion of the duty counsel clinics (in which the duty counsel will be renamed the "advice lawyer"), which will in many cases operate in locations other than the courthouse. The expansion will increase the number of duty counsel clinics from 37 to approximately 65.

¹⁹ For example, shelters were affected by the five per cent cuts implemented in 1995 and 1996 to all transfer agencies in COMSOC. As shelters have been forced to cut back on staff, court support workers, who assisted women through the legal process, have often been eliminated. Counselling programs, including those specifically addressing violence, offered primarily by family and child service agencies in Ontario, have also been cut. Until recently, those who sought relief in family courts unrepresented or before they obtained a lawyer, could speak to intake workers. These intake positions have been reduced and, in some cases eliminated, as a result of government cutbacks, thereby removing an important institutional support to unrepresented litigants at the beginning of the legal process. Finally, the Attorney General of Ontario is no longer permitting sheriff's officers to serve family court applications free of charge. Low-income applicants, who are unable to pay the costs of a process server, and who are not legally aided, are now in a position where they may have to personally serve the documents on their former partners themselves. Their awareness that they may have to do this can discourage applicants from continuing with their case.

²⁰ Social-assistance recipients claiming support have access to COMSOC parental support workers. In Provincial Division courts the parental support workers appear as agents for the applicant; this is not true in Unified Family Courts, which are superior courts in which parties cannot be represented by agents. There, parental support workers assist in the preparation of documentation, but applicants are represented by duty counsel in any court proceedings.

the remaining courts, duty counsel have assumed tasks far beyond their original purpose of providing summary advice and limited representation. Duty counsel have been thrust into the role of the parties' lawyers. They are being expected to interview clients, advise them on the filling-out of court documents, attempt to negotiate settlements, and argue matters before the courts, including participation in trials. Time constraints limit the quality of the assistance that can be provided. Clients may see a different duty counsel each time they appear in court. Moreover, the quality of duty counsel is uneven, and in some cases lack of time or expertise results in their giving inaccurate or misleading information.

Judges are being required to make important interim decisions about custody, access, and support on the basis of incomplete, untested, and possibly untrue evidence and the limited submissions of duty counsel. Property claims are often not pursued because they can be brought only in the General Division, where proceedings are more formal, expensive, and intimidating.

For all matters, the situation of unrepresented litigants is worse in the General Division than in the Provincial Court (Family Division). The formality of proceedings in the General Division is inhospitable to unrepresented litigants. Duty counsel are not available, and the process is very formal. Court administrative staff estimate that one-half of family law trials in the General Division now involve unrepresented litigants.

Trials with unrepresented litigants are a particular problem. Judges report that such trials often take twice as long as those in which counsel are present. Unlike many (if not most) unrepresented litigants, lawyers are often able to work out statements of undisputed facts and to narrow the issues for trial. Many of the efficiencies of case-management (which has enormous potential to expedite matters and save resources) are not realized when litigants are unrepresented. Time-saving procedures (such as presenting evidence-in-chief by way of affidavit) are much less likely to be utilized by unrepresented parties.

The increasing length and inefficiencies in family court proceedings increases costs not only for courts and their staff, but for institutional litigants such as the Ministry of Community and Social Services, the Children's Aid Society, and the Family Responsibility Office. As well, social assistance costs are increased if women are unable to access a share of property that might allow them to achieve financial independence, or if they receive a support award that is lower than might have been obtained with lawyer involvement. Further, if paternity is not established, the state may be required to assume responsibility for support of the child for 18 years. In the long term, the health care and criminal justice systems will bear the costs of not dealing appropriately with issues of family violence. Family law problems dealt with inappropriately do not disappear; they reappear in other forums. As a result, the ultimate cost of unrepresented litigants is often borne by other arms of the provincial government.

4. MAJOR ISSUES

Our brief review of the state of family law legal aid services in Ontario confirms an overwhelming lack of access to legal services. This lack of accessibility has several dimensions—an insufficient number of certificates; an inadequate tariff; a lack of access to legal advice and information; and barriers relating to language and culture.

Unfortunately, even with full coverage of both Priority One and Priority Two matters, there are still significant gaps in coverage. Many important custody and access issues, for example, remain uncovered, including cases regarding mobility and relocation; denial of access; change from supervised to non-supervised access; and requests to shift from daytime to overnight access. As well, limitations on the number of funded hours for those cases that are covered often make it difficult to provide high-quality services.

Regardless of the level of funding, we believe that capped funding demands that resources be directed to the most compelling legal needs and that they be deployed in the most efficient manner possible. Doing so necessarily requires prioritization of legal needs and a detailed analysis of the most cost-effective means of providing specific services.

In this respect, we believe that the prioritization regime developed by the Plan represents a good start. We do not, however, either endorse the Plan's specific priority regime or offer another in its place. The legal aid system in Ontario should, in our view, move towards a regime which considers more than the abstract gravity of the case. In order to target services most effectively, the system will have to develop the capacity to assess the impact that a denial of services has on individual clients and to allocate resources accordingly.

There are several other difficulties with the Plan's family law priority regime and the current manner in which it delivers family law services. The most obvious problem is that clients with lower-priority problems currently receive little or no legal assistance. In the absence of early intervention and assistance, many of these litigants may return to the legal system (and legal aid) when their problems are considerably more complex, serious, and costly. As a result, these family law litigants may lose the opportunity to resolve their cases at an early stage and at low cost.

At the same time, a program which expects savings through severe constraints on the hours available to work under the tariff, yet relies almost exclusively on lawyers to provide all services, runs the risk of underfunding counsel to a point where it is impossible to obtain quality service. Alternatively, underfunding of the tariff places unacceptable burdens on counsel to absorb the cost of providing services. Clearly, this situation is not sustainable in the long run. Unfortunately, numerous submissions to the Review noted that many experienced family law practitioners are now refusing to accept certificates for these reasons.

As a result, the family law legal aid system needs to develop new approaches to delivering services in addition to its prioritization by case type and cuts to the number of certificates and the tariff. The system must seriously consider redesigning or reconfiguring its delivery models. The goal of the family law legal aid program should be to design a delivery system dedicated to providing effective assistance to as many clients as possible, using whichever means can best provide a high-quality cost-effective service under the circumstances. For example, if the system increased the use of supervised paralegals for certain matters, savings achieved in those contexts could be used to increase the resources available for funding tariff services.

In the context of family law, we do not believe that any single delivery model can guarantee the delivery of legal aid in a manner that fully ensures the equally compelling priorities of cost-efficiency, high quality, and accessibility. Below, we summarize our

conclusions about the strengths and weaknesses of alternative means of delivering family law services.

(a) JUDICARE

The judicare model has consistently been defended by the majority of family law practitioners as the best method of delivering legal services. In theory, the judicare model promotes choice of counsel and access to specialized and expert service providers in the private bar. Both of these attributes are significant to family law clients, given the preponderance of complex, serious, and deeply personal legal proceedings in that area of law.

There are, however, serious concerns about the ability of many family law clients to make informed decisions about their choice of counsel. Family law clients often simply do not know how choose a lawyer. Even if they do, the lawyer of choice may not be willing to accept a legal aid retainer. Moreover, there is no requirement that lawyers offering judicare services have training or experience in family law or the necessary training to address the complex emotional, financial, and non-family legal needs which often accompany family law issues, or the diversity of the backgrounds and needs of clients. The advantage of choice of counsel within a judicare model is thus counterbalanced by problems of quality and access to counsel.

In view of judicare's many advantages, we strongly believe that a reformed legal aid system should continue to utilize private lawyers as a primary means of delivering family law legal aid services in Ontario, provided that appropriate quality-assurance systems are put in place, along with mechanisms to ensure work is done cost-effectively.

(b) STAFF OFFICES

Studies suggest that Staff Offices are more accessible for low-income clients than are private lawyers, particularly in urban areas. In fact, the Canadian Bar Association study concluded that the "second greatest barrier to access to legal aid is the selection of a judicare model for the delivery of legal aid services".²¹ Staff Offices, by contrast, offer "a highly visible presence for a legal aid plan, with a known location and a single stop for clients."²² Accordingly, the availability of Staff Offices is likely to assist prospective family law clients to know where to go to obtain legal services and to overcome some of the problems associated with selecting their own counsel.

Staff Offices can easily employ and utilize an array of non-lawyer professionals, such as supervised paralegals and family counsellors, who can deliver specific services more cost-effectively than can lawyers. Staff Offices have the potential to work well with—and sometimes be co-located with—a range of community and other agencies providing services needed by family law legal aid clients. Staff Offices can also be in a position to facilitate referrals to, work with, or be co-located with other parts of the legal aid system, such as an intake office or a community legal clinic. These linkages would make it easier to comprehensively assist a family law client with a variety of legal and non-legal needs.

²¹ Canadian Bar Association, National Legal Aid Liaison Committee, *Legal Aid Delivery Models: A Discussion Paper* (Ottawa: Canadian Bar Association, 1987) at 167.

²² *Ibid.*, at 237.

There are, however, serious concerns with the quality of service that a Staff Office can deliver if no provisions are made to limit the case-load. A Staff Office may also restrict choice of counsel, resulting in a possible “two-tier” model of representation. Moreover, a family law system based entirely on a staff model would present serious conflict-of-interest problems if both parties in a proceeding were legally aided. It is inappropriate for a single Staff Office to represent both sides of a family dispute. At the same time, it would be prohibitively expensive to maintain more than one Staff Office in many smaller communities.

(c) COMMUNITY LEGAL CLINICS

Although community clinics may appear to offer some advantages in delivering family law services, the disadvantages of this model outweigh any apparent advantages in relation to individual case work. The advantages are said to flow from the fact that family law issues often intersect with “poverty law” issues. Community clinics may be able to develop integrated, community-based responses to the full range of a client’s legal and non-legal needs.

However, we are concerned that the need for family law services would overwhelm the clinic system’s ability to deliver “poverty law” services, for which no other service providers exist. Questions also remain as to how family law services might be addressed in a community governance model, given that family law matters often pit one family member against another. Reliance on community clinics for family law services also raises conflict-of-interest issues.

We discuss the issue of community-clinic delivery of family law services in detail in chapter 11. As noted there, we recommend that clinics not provide direct family law services, except in exceptional circumstances, such as geographic remoteness.

In our view, the advantages claimed for clinics doing this work could be achieved by locating duty counsel or a satellite of a family Staff Office within or near a community clinic. Doing so would facilitate access, allow for easy referrals from the clinic staff lawyers and community legal workers, and permit identification and resolution of systemic issues relating to both “poverty law” and family law, without raising the concerns inherent in attempting to move family work directly into the clinics.

(d) DUTY COUNSEL

Duty counsel at present provide important family law services. An expanded use of duty counsel offers potential advantages for delivering some limited types of family law legal aid services, particularly if combined in an office with other service providers, such as supervised paralegals. We have concluded, however, that even an expanded duty counsel system should continue to focus on routine and brief matters which can be handled professionally with limited case preparation.

(e) BLOCK CONTRACTING

Block contracting of legal services is premised on a belief in the cost-effectiveness of undertaking numerous repetitive and predictable transactions. By way of contrast, the relative seriousness and complexity of an individual family law case is often difficult to predict. As a result, block contracting does not appear to be appropriate for family law matters.

(f) SUPERVISED PARALEGALS

Family law is a particularly problematic area for independent paralegals. Legal problems in family law are highly complex, volatile, and of extraordinary importance to the parties involved. The lack of accountability and quality control of independent paralegals poses very real risks to family law clients, who are very often themselves unlikely to fully appreciate or understand the complexity or long term consequences of their legal issues.

Supervised paralegals, however, could assume a much larger role in the delivery of legally aid family law services, particularly in Staff Offices and in an expanded duty counsel office. Many private counsel use paralegals for a range of family law tasks. It may be possible to encourage an increase in the use of paralegals by private counsel in the delivery of legally aid services—for example, in the initial interviews with clients and/or intake—and thereby make use of lawyer's time on a certificate more efficient. The experience of paralegals within the Divorce Law Office, as well as the extensive use of community legal workers in the clinic system, suggests that supervised paralegals can make an important contribution to the efficient and expeditious delivery of high-quality family law services.

(g) PUBLIC LEGAL EDUCATION

Public legal education, including seminars, informational videos, and self-help guides, should be an important component of a family law legal aid model. Area Offices, Staff Offices, and/or expanded duty counsel offices, as well as court administration offices, should have more informational materials available for family law litigants.

Public legal education must not be seen as a delivery model in its own right, but rather as a potentially important supplement to existing legal services. Public legal education cannot replace the need for lawyers within the family law legal aid system. In all but the simplest of procedures, such as uncontested divorces (assuming there are no other legal issues present), most family law litigants will need at least some degree of legal assistance. Indeed, there are at present many successful examples of public legal education materials being used in family law matters in Ontario.

An individual's ability to access and use the materials will depend on his or her literacy and educational levels. Nonetheless, public legal education may be able to improve the way in which these litigants are able to use the legal assistance available to them. For example, public legal information could be made available in a number of languages, even though individuals would still need to complete court forms in English or, in some cases, French.

5. PROPOSAL FOR A DELIVERY FRAMEWORK FOR FAMILY LEGAL AID SERVICES

As a starting point, we have identified several basic principles which we believe are fundamental to the successful design of a family law legal aid system in a capped funding regime. We stress that these principles, and this proposal as a whole, must be read in the context of the client needs and impact-centred priority-setting process we recommended in chapter 8. The principles are as follows:

- The system should provide early, sophisticated assessment of each case and the services it requires. The system must encourage early legal intervention, emphasizing advice, mediation, settlement and resolution where appropriate.

- The system should provide different degrees of legal assistance, based on the prioritization of legal needs, client circumstances, and potential individual and systemic impact.
- The system should have the flexibility to address simple matters efficiently and quickly, and enable emergency or complex cases to be referred to more extensive legal assistance and representation.
- Given the multifaceted nature of many family law needs, the legal aid system should be able to coordinate its services with non-legal community service providers.
- The system should provide services through a much broader range of delivery models, using private lawyers, some Staff Offices, an expanded duty counsel program, both private and staff lawyers, supervised paralegals and other non-lawyer professionals, and public legal education.
- In order to improve the impact and cost-effectiveness of legal aid services, the system should have a centralized capacity to support the services it provides, including a capacity to identify and advocate changes to the family law legal and procedural framework, and to related services.
- The system must ensure that the services it provides are of high-quality.

Briefly summarized, our proposed system consists of several linked and coordinated delivery models, including continued significant reliance upon judicare, the development of a series of Staff Offices across the province, expanded duty counsel services, increased use of non-lawyer professionals and public education materials, a sophisticated intake and case-assessment function, effective coordination with other services, and a case-management and quality-control program for services provided by both staff and private bar. This proposal is organized to take advantage of the strengths of each respective model. Service providers within this proposal include private and staff lawyers, supervised paralegals, social workers and other non-legal professionals, community agencies, duty counsel, and, for some purposes, community legal clinics.

By way of introduction, we should note that this proposal is based on a variety of sources, including the proposals outlined by Professors Brenda Cossman and Carol Rogerson in the background paper they prepared for the Review. Significant parts of this proposal also resemble the Family Case Management Program (FCMP) instituted by the British Columbia Legal Services Society in 1994.

The FCMP is essentially a process for “streaming” family law clients, depending on their legal needs. The FCMP has been used successfully both to reduce costs per case and to improve support for lengthy cases. The program has managed to meet both goals because it is structured in such a way that most cases are resolved either at the advice stage or within the limits of a limited retainer granted for non-emergency legal matters. The program also addressed complaints that the British Columbia Legal Services Society was funding too many cases that were merely vexatious or were being pursued to unreasonable extents or that people would not be pursuing if they were paying for their own legal action. As of September 1996, officials in British Columbia report that their case-management

program had effected a 15 per cent cost reduction and improved funding for complex cases.²³

Key components of our proposal include a special certificate or retainer for “emergency” family law matters and a sophisticated case-assessment/intake function for the full range of “non-emergency” legal needs. Specific programs included in our model include a significant summary legal advice program; a case-management program for delivery of legal aid services by either private or staff lawyers; and an expanded duty counsel program.

One strength of our proposal is its ability to adapt to changing needs of the legal aid system and to operate within a capped budget. Legal aid administrators can expand or contract coverage, depending on the funding available, confident that the highest priorities are being addressed by the most effective means possible.

As in the case for criminal law legal aid services, our proposal for the delivery of family law services is dependent upon the development of a sophisticated case-assessment and intake capacity. In family law matters, the case-assessment/intake function would begin when the applicant enters one of the Area Offices (or one of its satellites) described in chapter 9. Intake services could also be undertaken by Staff Offices or the duty counsel office, which, if linked electronically to Area Offices, would be able to provide or facilitate access to many of functions performed by Area Offices.

(a) EMERGENCY SERVICES

In family law matters, the first priority for intake staff would be to determine if the matter was an “emergency.” These are cases in which any delay in the provision of at least some form of legal assistance could have irreparable, serious consequences for the person involved, or for his or her family. Matters which could be considered “emergencies” include those where there is a threat to the safety of a spouse or child or a serious threat to the parent-child bond, such as custody and access cases involving abduction or kidnapping, and child protection cases where the child is at risk of being removed from the parents or has been removed. (Of course, other matters may be determined to be emergency cases, depending on the specific circumstances of the person involved.)

Where an “emergency” is identified, we recommend that the Area Office be authorized to provide a limited amount of legally aided assistance immediately. In the interests of speed and accessibility, we would also recommend that other legal aid offices, including Staff Offices and/or duty counsel offices, be allowed to authorize or provide “emergency” legal assistance. This legal assistance could be in the form of either an interim “emergency services” certificate or the provision of a limited amount of legal services within a Staff Office or duty counsel office until such time as the individual’s situation had stabilized.

Given the need to address such matters urgently, we would not normally subject applicants whose situations fell into this category to a full legal or financial assessment at this stage. Rather, we would undertake a more complete intake interview and assessment

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N. Henderson, “Issues Concerning Legal Aid” in F.H. Zemans, P.J. Monahan and A. Thomas, eds. *A New Legal Aid Plan For Ontario: Background Papers* (North York, Ont.: Osgoode Hall Law School, York University Centre for Public Law and Public Policy, 1997) at 103.

after the situation had stabilized. Depending on these circumstances, however, this assessment could be undertaken prior to the situation stabilizing.

In order for this program to be successful, the legal aid system will have to continue its close working relationships with the many community agencies which already provide emergency services to this population, including shelters and other family crisis centres. The goal of this program would be to make the legal aid system an effective component of the larger network of family emergency services.

In "emergency" cases, the applicant should be provided counsel of choice and be referred to legal assistance immediately. Clients who choose to see a private lawyer should be assisted in exercising their choice, including the use of approved lists of qualified service providers.

(b) NON-EMERGENCY SERVICES

In cases judged not to be emergencies (or where the situation had stabilized), we would subject each applicant to a full case-assessment and intake process.

The purpose of the case-assessment/intake function would be to assess accurately the legal needs and personal circumstances of the individual applicant on a number of different grounds. Is the person financially eligible for legal aid services? What are the person's legal needs? What are the person's personal circumstances? Are that person's legal needs "covered" by the legal aid program? Does the person have, in addition to legal needs, non-legal needs which require assistance from a community agency or government department? The legal aid system must undertake an analysis of each individual applicant against these criteria in order to allocate the legal resources appropriate to that person's individual circumstances.

In the family law context, it may be difficult to design a system with a single point of first contact at which all intake and assessment can be conducted. For example, a family law litigant may approach a Staff Office, a duty counsel office, a community legal clinic, or an Area Office in the first instance. We believe, however, that an Area Office (or one of its satellites) will be better placed than others to perform this intake and assessment function.

Upon entering an Area Office, an individual would be interviewed by a trained paralegal, supported by social workers and/or staff lawyers as necessary. The intake worker would interview the applicant in order to conduct a financial-eligibility assessment and prepare a preliminary assessment of the case. Intake workers' decisions on questions of coverage would be supervised by staff lawyers and plan administrators to ensure coverage rules are being applied consistently and accurately.

Applicants who are not financially eligible for legal aid assistance may still be provided with public legal education materials, or referrals to other agencies or to a member of the private bar.

Based upon this initial interview, it may be clear that the person's case does not really involve a legal issue at all. The person could then be diverted to non-legal service providers, such as a shelter or a government agency, depending upon the person's circumstances. Clients who are diverted to other agencies would be told that that they could return to legal aid if and when their matters assumed a legal dimension.

(c) TARGETED LEGAL ASSISTANCE

Persons who are financially eligible for legal aid and whose legal matter is covered by the legal aid program could be provided a range of legal services, including representation on a solicitor/client basis (by way of either a legal aid certificate or a Staff Office), with summary legal advice, or a referral to duty counsel, depending on their personal legal needs.

Needless to say, the determination of which services are appropriate for specific needs is complex. Given the wide range of family law issues and the need to analyse those issues in the context of each applicant's specific circumstances, we are not in a position to provide a comprehensive guide as to how to match services to needs. Below, we discuss a range of models for providing family law legal assistance and make some general recommendations regarding their operation and relationship to one another.

(i) Duty Counsel

Our proposal for family law duty counsel would not significantly expand the current mandate of family law duty counsel. Our primary recommendation on this subject is to increase significantly the number of duty counsel available to provide the services now offered for family law proceedings. Expanding the number and availability of duty counsel could allow more individuals with family law disputes to receive early legal advice, which might in turn facilitate the earlier resolution of their disputes. More duty counsel available for advice and assistance with court documentation might be able to address some of the significant gaps in the current system. Establishing a permanent duty counsel office (located, for example, at the Area Office, or the courthouse) could help address problems of accessibility—low-income family law litigants would know where to go to find legal assistance, especially in the absence of a Staff Office in a particular community. A further expansion of duty counsel to include a permanent duty counsel staff might also be able to address the existing problems resulting from lack of continuity in duty counsel.

In court, the assistance provided by duty counsel should continue to be limited to relatively simple, short-term, interim matters. Most significantly, duty counsel should not be allowed to conduct family law trials, given the limited time they have to prepare for a case and limited contact they have with litigants. Duty counsel involvement should be limited in other proceedings as well. For example, in child protection proceedings, duty counsel should likely be doing no more than advising parties of their rights, cautioning against signing consents, and assisting in adjournments.

An expanded duty counsel service could also integrate the use of supervised paralegals. Supervised paralegals might be able to assist unrepresented litigants in preparing their legal documents prior to seeing duty counsel. Supervised paralegals could review and prepare court documentation, allowing duty counsel to focus their limited time on more effectively advising, representing, and otherwise assisting unrepresented litigants.

(ii) Summary Advice

For matters which do not require solicitor-client case representation, we believe that financially eligible applicants should be provided with summary advice in the entire range of family law matters.

In our view, an opportunity to access summary advice prior to any court appearance would go a long way to address the unmet legal needs of the majority of family law litigants. At the moment, unrepresented litigants have a range of limited and unsatisfactory options. They can appear unrepresented in court and receive the minimal legal assistance through duty counsel, or they can walk away from the matter, or they can agree to whatever proposal is put before them by the opposing party (whether it be the former spouse or a government agency).

Many family matters can be addressed in the first instance, given sufficient and competent legal advice/information. Many would-be family law litigants are seeking information on matters about which they have not yet made a decision. For example, a woman may be considering leaving her husband, but will want to know the rules regarding custody and access. In the past, this woman may have been granted a certificate, even though she had not yet made a final decision. It may be more appropriate to give her summary advice or public-education materials before more extensive forms of legal assistance are provided.

An early legal advice program could also include assistance with court documentation and settlement issues in uncomplicated matters. For example, a person could receive advice regarding an uncontested divorce. Alternatively, minor, relatively simple variation applications and support applications involving COMSOC, and the defence of support enforcement proceedings, may be adequately assisted through this early legal advice program. Legal advice may also be appropriate for uncomplicated custody, access, and support cases. The potential for addressing support applications in this manner is especially promising, given the recently enacted child support guidelines.

A person receiving advice at this stage could also be provided with a referral to an expanded duty counsel office, which may then provide limited representation on consent matters, adjournments, and so on.

Our preference would be to have the advice program available in the same location as the intake function. Regardless of its location, the advice providers would have to understand and be able to communicate the applicable legal principles; have significant knowledge of, and connections to, non-legal community service agencies; and have training in cultural and linguistic interpretation. It would be necessary for the office to have significant public education materials available in a range of languages.

The advice component of this program would build upon and expand many programs already offered by the Plan, including its duty counsel clinic program and its “advice” certificates. It is also similar to the advice program offered by the British Columbia Legal Services Society.

During the course of providing summary legal information, it may be apparent that more extensive forms legal assistance are required. In these cases, whoever is providing summary legal advice should refer the person to an appropriate office in order to make an application for more intensive forms of legal assistance.

(iii) Case Representation

In instances where individual case representation is appropriate, the client would be provided with a limited retainer for either a private or a staff lawyer. The purpose of the

initial retainer would be to provide clients with limited representation in order to offer analysis and advice in regard to their legal problems. The limited retainer would also enable counsel to take any necessary steps, within the limits of the retainer, to resolve these legal issues for their clients.

As in our model for delivering criminal law legal aid services, family law case-representation services should be provided by both private and, when available, staff lawyers. In order to enhance the quality of family law services and to facilitate the trust and rapport necessary between a family law client and his or her counsel, we would allow the client to choose between private and staff representation. Choice of counsel would also introduce a limited form of competition between alternative service providers, thus allowing the legal aid administration to assess more accurately private versus staff delivery of similar services.

If a client's case cannot be resolved within the limits of the initial referral, the staff or private lawyer could submit an opinion letter outlining the additional services necessary. Upon receipt of the letter, legal aid administrators would determine whether or not to approve further service, and, if approval is granted, could establish a case-management plan.

The case-management program we propose can, and should, work in conjunction with many existing programs to deliver family law legal aid services, including the Plan's successful Settlement Conference program and various mediation programs. The design of the case-management program should allow parties to utilize Settlement Conferences, mediation, and other forms of alternative dispute resolution, or any other forum for resolving family disputes in circumstances where it would be appropriate to do so, as well as establishing standards and checkpoints for service delivery.

We anticipate that a very broad range of custody, access, and support cases could be addressed through an initial retainer. In British Columbia, the initial retainer is limited to six hours. B.C. officials report that the majority of non-emergency cases are resolved within this retainer, as lawyers are able to provide targeted assistance. Overall, the FCMP has led to a 15 per cent reduction in cost per case.

Given the justifications outlined in this chapter and in chapter 8, we believe that a reformed legal aid system should continue to utilise private lawyers as a primary means of delivering family law legal aid services in Ontario, provided that appropriate quality-assurance systems are put in place, along with mechanisms to ensure work is done cost-effectively. Some of the quality-assurance mechanisms which may be appropriate for private lawyers providing family law legal aid services are discussed in chapter 7 and in the background paper prepared for the Review on this subject by Sandra Wain.²⁴

As in the criminal law context, we recommend that family law legal aid services provided by members of the private bar be supplemented with a number of central supports in order to improve the overall quality of those services and to make their delivery more cost-effective. We would provide private lawyers with access to the dedicated research facility at the provincial office and to client-support facilities which we would expect to

²⁴ S. Wain, "Quality Control and Performance Measures". See Volume II of this report.

develop in family law Staff Offices. Access to the specialized research undertaken in a Staff Office would facilitate improved representation of individual clients and assist in the continuing education of the private bar in this complex and frequently changing area of law. We would make the research facilities available to private practitioners at every stage of a family law proceeding, including on appeals. Access to client-support facilities (such as paralegals, interpreters, social workers, and links to community networks) would improve a private lawyer's ability to meet the multifaceted non-legal needs of many family law litigants and would allow those lawyers to concentrate more fully on addressing their specific legal needs.

We also believe that Staff Offices should assume important responsibilities for delivering case-representation services. Staff Offices are in a particularly strong position to employ and utilize an array of non-lawyer professionals, such as supervised paralegals and family counsellors, who can deliver specific services more cost-effectively than can private lawyers. Staff Offices also have the potential to work well with community and other agencies providing services needed by family law legal aid clients. Moreover, Staff Offices are in a position to facilitate referrals to, work with, or be co-located with other parts of the legal aid system, such as an intake office or a community legal clinic or a young offender office. These linkages would make it easier to comprehensively assist a family law client with a variety of legal needs. Staff Offices will be successful, however, only where provision is made to limit case-load, assure quality, and refer conflicts of interest to the private bar.

(iv) Public Legal Education

While informational materials need to be made available throughout the family law system, the Plan could focus public-education efforts on the particular family law needs of low-income clients. These public-education materials could be made available through Area Offices, family court offices, Staff Offices, and/or community clinics. Materials should be made available at the point of first contact with the legal aid or family justice system, to ensure that individual litigants are as informed as possible, as early as possible in their proceedings. Further, there may be an important role for community clinics in relation to public legal education. Community clinics may be uniquely qualified to develop and disseminate family law materials that are responsive to the particular family law needs of local communities.

We conclude this chapter with two final observations. First, we believe that the process for involving the private bar in the decision-making process for family law legal aid issues is just as pressing as for criminal law legal aid issues. As a result, we recommend that Family Bar Advisory Committees be established in the same manner as Defense Bar Advisory Committees. Second, we believe that the process for undertaking internal appeals of family law legal aid decisions made by Area Directors should be the same as for criminal law legal aid appeals. Both of these issues are discussed in more detail in chapter 9.

6. RECOMMENDATIONS

1. Legal aid administrators should implement a flexible and locally responsive model for the delivery of family law legal aid services that will allow administrators, service providers, and clients to develop service-delivery options

that maximize the volume of high-quality services that can be sustained within a capped budget.

2. The legal aid authority should develop an effective way of assessing prospective family law clients' needs as individuals and of setting priorities among those needs based on the impact of the provision or the withholding of services in the circumstances.
3. Legal aid administrators should diversify the mix of service-delivery models used to provide family law legal aid services in Ontario as follows:
 - (a) private judicare lawyers should continue to be a primary provider of services;
 - (b) the legal aid system in Ontario should develop a limited number of Staff Offices. These offices should be staffed by lawyers, supervised paralegals, counsellors, and administrative personnel. These offices should be modelled on the full-service pilot approved by the Law Society in 1994. At least one Staff Office should be modelled on the Women's Family Law Centre pilot approved by the Law Society in 1993;
 - (c) community clinics should not be used to provide family law legal aid services directly, except in exceptional circumstances, although family Staff Offices should consider co-locating with, or locating near, community clinics;
 - (d) the legal aid system should develop an expanded duty counsel program for the delivery of family law services;
 - (e) block contracting should not be used as a means to deliver family law legal aid services;
 - (f) the use of supervised paralegals in providing family law services should be significantly enhanced, to support and assist the work of private, staff, and duty counsel lawyers, and to perform work which does not require lawyer involvement;
 - (g) Area Offices, Staff Offices, and/or expanded duty counsel offices should have more public-education materials available for family law litigants. These materials, prepared in a variety of languages, should be made available at the first point of contact.
4. The legal aid system should provide a special certificate or retainer to address "emergency" family law matters; a sophisticated case-assessment/intake function to assess and address the full range of "non-emergency" legal needs in light of established priorities; a significant summary legal advice program; a case-management program for legal aid services delivered by either private or staff lawyers; and an expanded duty counsel program.
5. The case-assessment/intake function for family law matters should begin when an applicant enters an Area Office (or one of its satellites), with some intake services being available at Staff Offices or duty counsel offices or, in some instances or at some locations, community clinics. These alternative intake offices should be

linked electronically to Area Offices in order to provide access or linkages to many of the same functions performed by Area Offices.

6. The structure of service delivery for “emergency” legal assistance in family law cases should be as follows:
 - (a) The legal aid system should provide immediate “emergency” legal assistance in instances where a delay in the provision of at least some form of legal assistance could have irreparable, serious consequences for the person involved, or for his or her family. Other legal aid offices, including Staff Offices, duty counsel offices, or community clinics, should be allowed to authorize “emergency” legal assistance in the absence of an accessible Area Office.
 - (b) “Emergency” legal aid assistance should be in the form of either an interim “emergency services” certificate or the provision of a limited amount of legal services within a Staff Office or duty counsel office until such time as the individual’s situation has stabilized.
 - (c) Individuals who need emergency legal assistance should not normally be subject to a full legal or financial assessment at this stage. Rather, in most cases, the individual should undergo a more complete intake interview and assessment as soon as the situation has been stabilized.
7. In cases judged not to be emergencies (or where the situation has stabilized), each applicant should be subject to a full case-assessment and intake process, including a test for financial eligibility.
8. Applicants who are not financially eligible for legal aid assistance or whose issue does not fall within the legal aid system’s services or priorities should be provided with public-education materials, or referral to other agencies or, through the Lawyer Referral Service, to a member of the private bar, as appropriate. Applicants who are diverted to other agencies should be told that they could return to legal aid if and when their matters assumed a legal dimension.
9. Applicants who are financially eligible for legal aid and whose legal matter is covered by the legal aid program should be provided a range of legal services, including representation on a solicitor/client basis by way of either a legal aid certificate or a Staff Office; summary legal advice in the entire range of family law matters; or referrals to duty counsel, depending on their personal legal needs.
10. The number of duty counsel available for family law proceedings should be significantly increased, in the form of a permanent duty counsel office located at either an Area Office or a local courthouse, where financially feasible.
11. The summary advice program should work in conjunction with the expanded duty counsel program in order to assist clients to utilize duty counsel effectively on consent matters and adjournments once they have received summary legal advice or help with court forms. The person providing summary legal advice should assist a client in making an application for more intensive forms of legal assistance, should that assistance prove necessary during the course of providing summary advice.

12. In cases where individual case representation is appropriate, the client should be provided with an initial, limited retainer for either a private or staff lawyer. The client should be allowed to choose whether that retainer is taken to a private or staff lawyer. If a client's case cannot be resolved within the limits of the initial referral, the staff or private lawyer should be authorized to submit an opinion letter outlining the additional services necessary. Upon receipt of the letter, legal aid administrators should determine whether or not to approve further services under a case-management plan.
13. The services provided by private lawyers, staff lawyers, duty counsel, and other staff should be subject to appropriate quality-assurance mechanisms. Standards should be set for lawyers wishing to be on panels to accept legal aid certificates.
14. Family law legal aid services provided by members of the private bar should be supplemented with a number of central supports, including access to dedicated research and other central services, and to client-support facilities in family law Staff Offices. Staff Offices should also develop strong linkages with community and other agencies providing services needed by family law legal aid clients and to other legal aid offices dealing with related issues such as young offender matters.
15. The family law case-management program should be designed to work in conjunction with many existing programs to deliver family law legal aid services, including the Plan's successful Settlement Conference program and various mediation and other programs, if appropriate.
16. A Family Bar Advisory Committee should be set up in each community, made up of members of the local family bar who will provide assistance to the local Area Director or senior officials within the legal aid authority:
 - (a) advising on guidelines for the Area Director in relation to discretionary decisions;
 - (b) advising on law and procedural reforms; and
 - (c) advising on case-management standards, quality assurance and mentoring programs.
17. Where the Area Director makes a determination about whether a case is covered or which delivery model is appropriate, the Area Committee should hear appeals from such determinations. Where there is a decision that it is not appropriate for a client to change his or her counsel, an appeal could also be taken to the Area Committee. Where there is a decision by the Area Director to strike a lawyer off the local legal aid panel, an appeal could be taken to the Provincial Director. The Provincial Director's decision not to authorize an appeal to the Court of Appeal for Ontario or the Supreme Court of Canada would be reviewable by a subcommittee of the governing authority.

“POVERTY LAW” LEGAL AID SERVICES

In this chapter we discuss the issue of “poverty law” legal aid services. Included in this chapter will be an analysis of the unique nature of “poverty law” needs and the context in which those needs are addressed currently. By necessity, much of this chapter analyses the role of community clinics. More specifically, this chapter contains a detailed discussion of the legislative mandate to deliver “poverty law” services, community governance, clinic accountability, the relationship of the community clinic system to the larger legal aid system, clinics’ scope of services, and gaps in “poverty law” coverage. The final section of this chapter makes recommendations on each of these subjects.

1. THE NATURE OF “POVERTY LAW” AND THE NEED FOR “POVERTY LAW” SERVICES¹

The term “poverty law” describes the broad areas of law and legal needs which arise by virtue of an individual’s or a group’s poverty. As the Honourable Mr. Justice Osler noted in his 1974 *Report of the Task Force on Legal Aid*, “the poor have many problems peculiarly their own ... [The poor] are tenants not landlords, debtors not creditors, purchasers not vendors”.² In general, the legal needs of the poor have traditionally included housing law; income-maintenance law (including employment insurance, the Canada Pension Plan, welfare, family benefits, and workers’ compensation); work-related issues (including employment standards, and occupational health and safety); and consumer and debt problems.

The interpretation of the complex and frequently changing statutory and regulatory schemes in these fields often requires legal assistance. For many reasons, “poverty law” cases do not fit into “traditional” legal models. Unlike much civil litigation, “poverty law” cases often involve what seems like very little money. Unlike criminal law cases, immediate loss of physical liberty is rarely a consequence of an unsuccessful “poverty law” proceeding. Unlike most “traditional” legal proceedings, most “poverty law” matters involve proceedings before government bureaucracies or administrative tribunals, not courts.

¹ Much of the discussion in this section relies upon the work of Professor Janet Mosher and the background paper she prepared for the Review: “Poverty Law—A Case Study”, Vol. III, this report.

² Ministry of the Attorney General of Ontario, *Report of the Task Force on Legal Aid* (Toronto: Ministry of Attorney General, 1974) at 39.

Despite these differences, “poverty law” matters are often of overwhelming significance to the individuals and groups affected. For example, despite the comparatively small sums involved in “poverty law” proceedings, those amounts can constitute a large proportion of a low-income person’s earnings. The resolution of a “poverty law” issue may have serious consequences for the ability of persons to feed, clothe, and shelter themselves and their dependants. Indeed, for these reasons it is sometimes argued that “poverty law” legal aid services are of greater importance to the economically disadvantaged than are criminal or family law legal aid services. As the National Council of Welfare reports, most low-income people “have never been, and probably never will be, in trouble with the [criminal] law”,³ whereas the network of civil laws governing most aspects of their everyday lives create a large (and largely unmet) need for legal advice and assistance.

Many “poverty law” clients also possess special characteristics which give rise to specific needs and demand specific responses. In the “traditional” practice of law, a client identifies his or her own legal need, brings a problem to the lawyer, and instructs the lawyer as to his or her wishes. By way of contrast, the economically disadvantaged often lack information about their rights and entitlements. They may also be unable to bring forward their legal claims because of the destabilization of their lives by abuse or homelessness, or because of their illiteracy, lack of education, the discrimination they suffer in their day-to-day lives, or the fact that they often do not speak English or French as a first language, if at all.

2. CONTEXT

In Ontario, “poverty law” legal aid has been delivered largely, although not exclusively, by community legal clinics. There are currently seventy such clinics in Ontario, serving more than one hundred communities. Within this number, there are two main categories of clinics: general clinics and specialty clinics. Fifty-six clinics are general-service clinics, offering services in core areas of “poverty law” practice. Depending on their location, general clinics may also offer services tailored to specific communities including Franco-Ontarians (e.g., Clinique juridique populaire de Prescott et Russell) and Aboriginal peoples (e.g., Keewaytinok Native Legal Services).

Fourteen clinics specialize in a particular area of law or in the legal needs of a specific client group. Examples of specialty clinics include the Advocacy Centre for the Elderly, the Advocacy Resource Centre for the Handicapped, Justice for Children and Youth, the Centre for Spanish-Speaking Peoples, Aboriginal Legal Services of Toronto, and the Canadian Environmental Law Association. Ontario also has three clinics that are affiliated with university law schools in the province: the Correctional Law Project (Queen’s University), Legal Assistance of Windsor (University of Windsor), and Parkdale Community Legal Services (Osgoode Hall Law School). The Plan also funds six student legal aid societies, which are not formally considered part of the community clinic system.

Clinics generally provide the following services:

- summary advice and legal information within clinic areas of practice;

³ National Council of Welfare, *Legal Aid and the Poor: A Report* (Ottawa: National Council of Welfare, 1995) at 9-10.

- referrals to social service and community agencies, lawyers in private practice, and the Plan;
- client representation before courts and administrative tribunals, including Landlord and Tenant Court, the Workers' Compensation Appeals Tribunal, the Social Assistance Review Board, tribunals dealing with Canada Pension Plan and employment insurance matters, and the Criminal Injuries Compensation Board;
- public legal education, including seminars, workshops, presentations, and the production of pamphlets and videos in many languages;
- initiatives aimed at protecting and promoting the legal interests of the low-income community, including broad-based litigation; participation on government task forces and advisory bodies; and appearances before municipal councils, legislative committees, and public commissions and inquiries; and
- community projects which assist clients to form self-help groups focused on low-income issues.⁴

In fiscal year 1996, clinics carried 37,097 files, provided summary advice in 147,636 matters, made approximately 70,000 referrals, conducted 2,055 public-information sessions (reaching more than 72,000 people), and presented 792 briefs or submissions.⁵ These statistics must be used cautiously, however, as it is more difficult to summarize clinic program services than certificate program services. Simple case totals may not reflect the relative complexity or impact of a single case. One clinic may be involved in several law-development initiatives, another in high-volume advisory services.

In fiscal year 1996, the clinic system cost a total of \$32.5 million, just slightly more than 10 percent of the total legal aid budget of \$315.6 million. Clinics have always operated under capped budgets, and their funding has been frozen since fiscal year 1993.

Clinics are not-for-profit corporations, managed by volunteer boards of directors who are responsible for clinic administration, personnel management (boards are the employers of the staff of each clinic), financial management, the determination of legal services to be provided (both the choice of areas of law to be dealt with and the methods or strategies to be used), and the evaluation of services.⁶ The day-to-day management of each clinic is the responsibility of the Executive Director (a member of the staff). As noted in chapter 3, clinics are staffed by lawyers, community legal workers, and administrative staff.

The practices of most geographically-based clinics are heavily weighted towards the areas of income maintenance, housing, and consumer problems—those areas of law which impact pervasively upon the lives of the economically disadvantaged. The practices of

⁴ Law Society of Upper Canada, Ontario Legal Aid Plan, *Community Legal Clinics Annual Report 1991-1992* (Toronto: Law Society of Upper Canada, 1992) at 7.

⁵ See Community Legal Clinics Statistics Discussion Paper, 1996, and the letter from clinic funding staff to boards and deans dated November 29, 1996. Clinic funding staff have stated that there are many problems in the processes used to gather the information reported by these statistics. Clinic funding staff have finalized a new scheme for data collection, based upon new (and defined) categories to better match actual clinic practices, and this new system is expected to be in place as of January 1998.

⁶ These responsibilities are spelled out in the *Clinic Operating Manual* and in clinic certificates.

several clinics, the “specialty” clinics in particular, often address a range of other legal issues of particular significance to their communities. Individual case work is the predominant activity of most clinics.

As noted above, the Clinic Funding Committee (CFC) operates independently from the Legal Aid Committee, with a separate budget and separate administration. This framework was considered necessary to promote and protect the unique mandate of community legal clinics. The day-to-day carriage of CFC functions, including decisions in the first instance with respect to funding is undertaken by clinic funding staff (CFS). Appeals on initial funding decisions made by the CFS are to the CFC.

The CFC also provides services that directly support the work of clinics. The CFC funds regular regional training sessions and supports the work of interclinic committees designed to coordinate services in the fields of social assistance, housing, and workers' compensation law. The CFC also funds the Clinic Resource Office (CRO), a small office that provides clinics with legal research and strategic legal advice, produces and maintains a “poverty law” data base of materials otherwise difficult to obtain, provides advisory support to interclinic committees, acts as a clearinghouse for the most recent information on relevant substantive law and clinic activities, and contributes to clinic training and continuing legal education.

Given the historic lack of private lawyers practising in the “poverty law”, clinic lawyers and legal workers remain the most significant group of practitioners in Ontario with expertise in this area of law.

Over the two decades of their operation, some clinics have offered limited services in criminal law, family law, and other civil matters on an exceptional basis. However, such assistance has generally been provided only where clients have little access to other legal services, primarily in remote areas.

Several other jurisdictions deliver services using models similar to Ontario's community clinics, including British Columbia,⁷ Quebec,⁸ Australia, and England and Wales.⁹

⁷ British Columbia currently has fourteen community law offices and fifteen Native community law offices. These are administered as separate legal aid societies and operate as funded agencies of the Legal Services Society. The community law offices provide services in areas similar to those of Ontario's-geographically based clinics: residential tenancies, social assistance, and employment law. As is true of clinics, services are delivered by a mix of lawyers and supervised paralegals, and, like clinics, they rely not only on direct client service, but also on public legal education and community development. See generally, Nancy Henderson, *Issues Concerning Legal Aid and Some B.C. Experiences*, in F.H. Zemans, P.J. Monahan and A. Thomas, eds. *A New Legal Aid Plan for Ontario: Background Papers* (North York, Ont.: Osgoode Hall Law School, York University Centre for Public Law and Public Policy, 1997).

⁸ Local legal aid offices operated by regional corporations in Quebec provide representation in criminal law, family law, and “poverty law” matters, and engage in legal education and law reform. See generally, Susan Charendoff, Mark Leach, and Tamara Levy, “Legal Aid Delivery Models”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

⁹ New South Wales has a network of 26 community legal clinics similar to Ontario's. Fifty-five Law Centres in England and Wales provide similar services to those of Ontario's clinics but are more individualistic and grounded in local initiatives. See generally, Thurtell and Smith, “Desperately Seeking Sustenance” (1993), 9 *J.L. & Soc. Pol'y.* 258.

3. CURRENT LEGAL NEEDS

The determination of current legal needs in the field of "poverty law" is a complex undertaking. Unlike more "traditional" fields of legal practice, it is difficult to calculate current needs based only on measures such as expressed demand or numbers of unrepresented litigants. This is the case because many potential "poverty law" clients are either unaware of their rights or unable to act upon them.

In simple terms, it is clear that the need for core-area "poverty law" services is increasing. Unemployment and underemployment increase demand for both government benefit programs and "poverty law" services. Increases in the numbers of people living in poverty, such as sole-support families, the disabled, the elderly, and homeless persons, also increase demand for "poverty law" services, as do reductions in other community services which help the disadvantaged.

One obvious unmet legal need for "poverty law" services is demonstrated by the clinic system's lack of geographic coverage across the province. The original plan for the clinic system was to make general-service clinics available in all parts of the province. At present, however, much of the population of the province is without clinic services, including the communities of Lindsay, Guelph, Owen Sound, Brockville, Stratford, and Parry Sound.¹⁰

Commentators have also noted increased requests for "traditional" legal aid services within community clinics, presumably because of the reduction in the number of certificates issued in these areas. Frederick Zemans and Patrick Monahan surveyed four clinics across the province and noted that many more requests for summary advice in family law have been recently been received by the clinics.¹¹ Bogart and Meredith, in their study for the Review, found that many clinics are experiencing a significant increase in requests for assistance in family law matters from people who have either been denied a certificate or been discouraged from applying for one.¹² Some clinics have responded by providing summary advice; others by creating self-help kits and pamphlets; and still others by conducting workshops with the assistance of the private bar.

As in other areas of legal aid services, the failure to provide "poverty law" legal aid services has costs. As the Advocacy Centre for the Elderly notes in its submission to the Review:

... if legal services are not available, the potential costs to the community are high as failure to resolve a problem dealing with basic rights may contribute to other problems, leading to a

¹⁰ The complete list of communities without general-service clinics includes the following counties and districts (the major town is included in parentheses): Dufferin (Orangeville), Elgin (St. Thomas), Grey-Bruce (Owen Sound), Haldimand-Norfork (Simcoe), Haliburton (Minden), Huron (Goderich), Leeds and Grenville (Brockville), Lennox and Addington (Napanee), Oxford (Woodstock), Parry Sound (Parry Sound), Perth (Stratford), Temiskaming (Kirkland Lake), Victoria (Lindsay) and Wellington (Guelph).

¹¹ "Our interviews with clinic staff and boards across the province indicate that many would-be certificate applicants have been "displaced" onto clinics, creating increased caseloads in areas of traditional certificate practice, particularly family law." F.H. Zemans and P.J. Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (North York, Ont.: York University Centre for Public Law and Public Policy) at 37.

¹² See W. Bogart and C. Meredith, "Current Utilization Patterns and Unmet Legal Needs", a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

snowball effect, with additional human and financial costs for resolution or an escalation of dependency of that person on public systems".¹³

4. DISCUSSION AND PROPOSAL

It is widely acknowledged that community legal clinics are best suited to deliver "poverty law" services. This conclusion has been confirmed by numerous independent studies on this subject, including the 1974 Osler Report; the 1978 Grange Report; the 1987 Canadian Bar Association report, *Legal Aid Delivery Models: A Discussion Paper*; the 1992 *Review of Legal Aid Services in British Columbia*; and the 1997 report by Osgoode Hall Law School Professors Frederick Zemans and Patrick Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario*.

We have come to the same conclusion. Indeed, the community clinic model meets many of the goals we have identified for the larger legal aid system. The community clinic system can run on a capped budget; it works to understand and respond to individual and community needs; it utilizes lawyers, non-lawyers, public legal education initiatives, and other delivery systems in order to deliver services cost-effectively; it prioritizes needs and attempts to meet them strategically; it has developed linkages to nonlegal service providers; and it has recently adopted a quality-assurance program.

Subject to the discussion below, we have concluded that the community clinic model is the most appropriate to deliver "poverty law" services and that independent community governance is integral to that model. We strongly support the continuation and expansion of the current clinic system and propose only discrete reforms designed to make the current system function more effectively.

We believe that the clinic system should meet the same high standards we would require of the other components of the legal aid system. Our goal in this area is to propose reforms which will lead to an enhanced clinic system capable of delivering a wide range of accessible, cost-effective, high-quality services in furtherance of its mandate to provide "poverty law" services. In order to achieve this goal, the clinic system should improve its overall planning capacity and be able to be more fully coordinated with, and accountable within, the larger legal aid system. Clinics themselves should be governed by skilful, responsive, and responsible boards of directors who are well versed in the identification, prioritization, and meeting of local needs. In furtherance of these responsibilities, boards of directors should be assisted by a number of central supports. The proposals and recommendations that follow address each of these substantive issues.

We stress that our recommendations in this field must be supported by the adoption of our recommendations for criminal and family law legal aid services (in chapters 9 and 10) and by adequate funding for the system as a whole (in chapter 14). We strongly believe that the success of community clinics—and ultimately of the "poverty law" mandate itself—can be assured if low-income Ontarians have access to a broad range of high-quality criminal law and family law services provided by other parts of the legal aid system. In the absence of these services, there is likely to be considerable pressure on legal aid administrators and their funders to divert clinic funding to provide these services or to pressure clinics to

¹³ Advocacy Centre for the Elderly submission to Ontario Legal Aid Review at 1.

provide them. The former would directly take resources from a key area of need; the latter would indirectly have the same effect—clinics would be overwhelmed by demand for these services, which, in turn, would threaten the provision of “poverty law” services at the local level.

Within this context, it is important to determine which administrative unit within a renewed legal aid authority will review clinic operations and determine their effectiveness. This unit—which will ultimately be charged with making decisions about the funding and de-funding of clinics, evaluating the performance of the clinics, and working to facilitate system linkages and supports—must have a thorough knowledge of clinics, their mandate, and the conditions necessary for their effective functioning. The need for expertise in this area suggests strongly the establishment of a separate unit that is linked to the central administration of any provincial legal aid authority. This subject is discussed later, in chapter 15, on governance.

That said, we have identified a number of issues which need to be addressed in the context of our analysis of the entire legal aid system in Ontario. These issues include:

- legislative mandate;
- community governance;
- accountability to the funder;
- the integration of community clinics into the larger legal aid system;
- clinics’ scope of services, including whether they should provide assistance in family, criminal or immigration matters; and
- the completion of the community clinic system.

(a) LEGISLATIVE MANDATE

At present, the *Legal Aid Act* does not specifically require the Plan either to fund clinics or to provide “poverty law” services. Rather, the legal authority to fund clinics and undertake such services resides in the Clinic Funding Regulation.

Given the central importance of these services to low-income Ontarians, we believe that the legal aid system should be statutorily mandated to provide “poverty law” services. The current Clinic Funding Regulation is sufficiently flexible to permit the recognition of diverse and changing “poverty law” needs. Subject to limited fine-tuning, the Regulation’s language would appear to be an appropriate basis for a statutory “poverty law” mandate.

(b) COMMUNITY GOVERNANCE

The issue of community governance is of fundamental importance to the mandate and operations of the community clinic system and the delivery of “poverty law” services. Besides having obvious implications for the legal and operational structure of community clinics, the resolution of the community governance issue has consequences for a series of related issues, including clinics’ accountability to their funder, the mandate and role of the Clinic Funding Committee, regionalization, and the relationship of the clinic program to other legal aid services.

Community-elected boards have historically been important in ensuring independence from both the Plan and the provincial government; in assisting the clinic in identifying and prioritizing community needs; in ensuring accountability to their communities for the nature

and quality of services provided; and, through their board members, in providing vital linkages to other community services.

Based upon our extensive consultations across the province and on our review of the dozens of submissions we have received on this topic, we are satisfied that community boards do and should continue to discharge these functions. We have concluded that there is a great deal of evidence that community boards ensure responsiveness to local community needs.

Information about the needs of the community and priorities within the community comes to boards through a variety of avenues: reviews of demand for services (statistics and staff analysis of trends); assessments of legislative or policy changes; consultations with community agencies; board members and staff; strategic planning sessions; client questionnaires; information and service requests from other agencies; assessments of community growth and demographics; consultation through special committees; and formal needs assessments of the community. The Advocacy Resource Centre for the Handicapped, for example, periodically surveys its membership "about the legal priorities of the constituencies each represents. Results are distributed and form the basis for discussion at 'priorities days' at which the membership meets and makes decisions which direct our work for the coming year".¹⁴

Thus, community boards are able to fulfil many of the principles that we believe are important to the design of a governance regime: needs assessment, priority-setting, accountability, quality assurance, independence from government, innovation and experimentation, and cost-efficient delivery of services. As a result, we have concluded that independent community boards are an important component of the community-clinic model and are essential to the delivery of "poverty law" services in Ontario. Well-run independent community boards are an important bulwark protecting the independence of clinic operations and are an invaluable tool for identifying and prioritizing local needs within a capped budget.¹⁵

Our consultations have revealed, however, that the current operation of some community boards could be improved. For example, many boards appeared to digress from their role as "governing" bodies into the day-to-day management of clinic operations. Some boards lack the detailed skills required to address the full range of clinic issues, be they strategic planning, personnel management, or financial policies. It is also apparent that some clinics are more successful than others in recruiting and involving the disadvantaged in community boards. This consideration is particularly important, given that low-income earners bring undeniable expertise to the work of a community legal clinic.

On the basis of our review, we have identified several areas for improvement. In this discussion, we propose reforms which we believe will strengthen the existing community governance model.

¹⁴ Advocacy Resource Centre for the Handicapped submission to the Ontario Legal Aid Review at 3.

¹⁵ This is not to say that clinics might not be included in larger schemes of human resource management, technological support or other administrative issues as the community clinic system is integrated into the larger legal aid system. In such circumstances, community boards would continue to perform the vital policy- and direction-setting functions asked of them.

Our first proposal reflects the need to improve training for all community clinic board members. Board training has always been considered a priority by administrators, board members, and clinic staff. In the new legal aid system we recommend, the unit of the legal aid authority responsible for clinics should make training a significant priority for all community boards.

The legal aid authority should retain responsibility for training in areas of concern to all clinics, such as issues relating to the delivery of services and personnel management. Individual boards themselves must assume responsibility for training on issues of local importance. Whether clinics choose to do this individually, regionally, or in conjunction with the boards of other community agencies would depend upon the size of the board, its training objectives, and the resources available to it.

Many boards have constituted “board development committees” in order to support ongoing board training. In order to be successful, board training must be accessible to people with a variety of educational backgrounds and should attempt to include cultural, race, and ethnic issues in order to ensure that needs can be properly understood and priorities can be set fairly.

In addition to assistance with training, there are other measures which could be put in place to improve board performance. In their recent Operational Review of the clinic system, Corlett and Associates found that board members were anxious to share information with one another—to learn best practices—but that there are few forums for accessing and sharing solutions. Corlett and Associates reported that “there are an astonishing number of creative solutions to common problems in the system...we are convinced that somewhere in the system a clinic has found a solution to every possible problem”.¹⁶ As a result, the Operational Review argued strongly for the creation of additional infrastructures to support the work of the community boards, supports which could improve client services without threatening the independence of clinics.

We share this conclusion, and we recommend that the unit of the legal aid authority responsible for clinics develop systems of support for community boards, including assistance in the areas of fiscal management, labour relations, conflict resolution, and technical support. This unit must also facilitate the development of board “best practices”, mentoring opportunities, access to experts, and improved communication among community boards.

(c) ACCOUNTABILITY TO THE FUNDER

This topic is closely related to the next one—community clinic integration within the larger legal aid system.

It will be recalled that an integral component of the governance framework proposed in the Grange Report was the requirement that community clinics be accountable for the expenditure of public funds. The Clinic Funding Regulation was designed to assure autonomy and independence for the clinics in matters of policy and administration while preserving accountability for the expenditure of public funds.

¹⁶

S. Corlett, *Operational Review to the Community Legal Clinic System* (unpublished report prepared for the Clinic Funding Committee, 1993) at 31.

Within the clinic system, accountability issues are sometimes controversial. Matters of financial accountability are relatively straightforward: the CFC currently requires and receives financial reports and financial audits. On the other hand, many clinics have historically objected to measures designed to analyze "operational" accountability (including quality of services, and responsiveness to communities). Despite these reservations, the clinic system has historically been much more proactive in assessing and monitoring the quality of legal aid services than other components of the legal aid system. For example, in 1987 the CFC developed Clinic Performance Evaluation Criteria. These criteria have recently been supplanted by a new clinic "Quality Assurance Program".

We recommend that the clinic's "Quality Assurance Program" be pursued vigorously. We also believe that the clinic system must continue its current efforts to regularize data collection across the province. We also recommend that individual clinics and the clinic system generally must significantly improve their ability to plan strategically. (This recommendation is discussed in more detail below.) These efforts will go a long way to continuing to assure the clinic system's accountability for the use of public funds.

(d) COMMUNITY CLINIC INTEGRATION WITHIN THE LARGER LEGAL AID SYSTEM

In an era of capped funding, it is important to be able to coordinate all legal aid services in order to allocate resources in the most effective and efficient manner possible. During the era of open-ended funding of certificates, the need to coordinate services among clinics and/or between the clinic system and the rest of the legal aid system was comparatively limited. In the event of a "gap" in clinic coverage, an applicant could apply for a certificate and could, in many instances, receive legal aid assistance.

The question of clinic integration has two dimensions. The first is whether clinics effectively coordinate their services and resources among themselves. The second is whether clinic services and resources are effectively coordinated with other components of the legal aid system. Based upon our consultations across the province, we have concluded that clinic services and operations could be coordinated more effectively in both dimensions.

Within the clinic system itself, there are several structures or measures which serve to coordinate resources and services, including the Clinic Funding Committee and clinic funding staff; the Clinic Resource Office; specialty clinics (including, but not limited to, Community Legal Education Ontario); regional and interclinic working groups; and a range of collective activities initiated by clinics themselves, including the recently founded Provincial Association of Community Legal Clinics.

These activities and programs are important in and of themselves, but more could be done. For example, many clinics coordinate many services among themselves only on a informal or an *ad hoc* basis. Our consultations confirmed Corlett and Associates' earlier finding that many opportunities for sharing of resources and information are missed because of a lack of communication. More important, there is no regular process for setting strategic directions for the clinic system as a whole: even though many individual clinics have excellent strategic-planning processes, the overall system does not. In the past, geographic gaps in clinic coverage and limited resources have militated against individual clinics' seeing themselves as components of a larger system. In the future, we believe that much more effort would be appropriate in this area.

In a reformed legal aid system, it is clear that individual clinics, the clinic system, and the overall legal aid system should, and could, coordinate their services much better than at present. Our consultations revealed that Area Directors and clinic Executive Directors were often unaware of the specific activities of each other's organization. As a result, there was often distrust or misinformation about the other "side" of the legal aid system.¹⁷ At the level of provincial administration, many observers told us that the Legal Aid Committee and the Clinic Funding Committee could improve their communication and coordination of services significantly.

Until recently, there was not a pressing need to coordinate the services of the certificate program with those of the clinic program. As a result, each "side" of the legal aid system became somewhat isolated from the other over the course of time. We believe that that isolation must end if legal aid services are to be improved in Ontario. Indeed, many of our recommendations on the subject of legal aid governance, identification of client needs, priority-setting, and service-delivery innovations will significantly improve the coordination of clinic and non-clinic services.

We believe the coordination of services between clinics and the clinic system and the larger legal aid system would be significantly enhanced if individual clinics and the overall clinic system initiated a multiyear strategic-planning process. The purpose of this initiative would be to develop processes and programs that will enhance the ability of the clinic system to provide "poverty law" services. Necessary components of this strategic-planning initiative would be an assessment of the current and likely future demand for such services; an evaluation of the strengths and weakness of the system to meet that demand; the development of programs or strategies designed to create or improve the coordination of services and skills within the system; and the development of performance measures against which the achievement of those objectives can be assessed.

We would expect that the unit within the legal aid authority with responsibility for overseeing clinics would also be responsible for facilitating the overall strategic-planning process. In order to be effective, this process must involve both provincial and local representatives, clients, and non-legal community-based organizations. Representatives from local clinics and their communities must identify the legal needs of those communities, draw attention to innovative and effective measures to meet those needs, and identify areas where they need additional support. The Provincial Association of Community Legal Clinics should play a vital role in this process.

Combined with a similar exercise in the areas of criminal, family, and other civil matters, this process would go a long way to ensuring appropriate, needs-based, transparent decisions by the central funding authority by providing an ongoing basis for evaluating community needs and specific clinic funding requests. This process would also ensure clearer coordination between the clinic system and other components of a legal aid system. This process should also assist clinics within the same region, or providing the same types of services, to improve the horizontal integration of their services.

¹⁷

Of course, this was not always the case. We also heard of many examples of Area Directors and Executive Directors working well together.

At a local level, this planning process should be undertaken by each individual clinic. The clinics which currently have excellent strategic-planning processes should be used as models for those clinics whose planning is less successful. This local process must be undertaken in conjunction with other legal aid service providers in the area. In the context of capped funding, the legal aid system must comprehensively identify local needs and coordinate services, as between alternative service providers. As a small step towards this goal, we recommend that the Executive Director of each clinic sit on local legal aid Area Committee, and that the local Area Director, or his or her designate, sit on the board of directors of the local clinic.

(e) SCOPE OF SERVICES

The broad scope of services provided by community clinics corresponds to the multifaceted, needs-based, strategic, cost-effective services we envisage being utilized by a reformed legal aid plan. Indeed, we believe that such a broad scope of services is necessary for the system to operate effectively, as noted by the submission to the Review of the Advocacy Centre for the Elderly:

[case representation] alone would not address the systemic issues that lead to the individual client problems. Without public legal education initiatives, more client services would be required. Without law reform activities, more money would be needed to respond to client needs that arise from the impact of legislation and policy which creates problems for many individuals. Without a comprehensive approach to these legal issues, demand for individual representation would likely increase.¹⁸

The more vexing question on this subject is whether or not clinics should be required, or allowed, to deliver criminal law or family law services. In the historical evolution of the legal aid plan, areas of practice were divided between judicare and the community clinics. The certificate system provided criminal, family, immigration and refugee law services; the clinic system provided "poverty law" services.¹⁹

Our survey of clinic activities reveals that this traditional "division of labour" largely remains to this day. We say "largely" because it is also clear that some clinics provide limited services in all of these areas.

Clinic statistics show that the vast majority of criminal and family law service is in the nature of summary advice. In 1996, clinics provided summary advice in 10,139 family law cases (representing less than seven percent of clinic "summaries"). In the same year, clinics opened 196 family law files (representing fewer than one percent of total new files). These family law files were concentrated in a few clinics: Justice for Children and Youth, Keewaytinok, Willowdale and East Toronto. In 1996, criminal "summaries" represented 2.86 percent of the annual total. Most of this advice was provided by clinics primarily serving Aboriginal populations: Aboriginal Legal Services of Toronto, Kenora, Keewaytinok, Manitoulin, and also Justice for Children and Youth. Not including statistics

¹⁸ Advocacy Centre for the Elderly submission to the Review at 8.

¹⁹ With respect to immigration law, clinics were initially the only legal service providers in this area. Certificates later became available, and immigration became perhaps the only area of "shared jurisdiction" (although certificates in the past were, in limited circumstances, issued for some areas of "poverty law" practice).

from the Correctional Law Project, which serves only those incarcerated, clinics opened 165 criminal law files in 1996. These files again were concentrated in a few clinics: Justice for Children and Youth, Keewaytinok, and Kenora. The statistics show greater clinic involvement in immigration law, with 822 files in 1996. Here, too, the work is relatively concentrated; most clinics do not provide immigration and refugee law services, some clinics provide a small amount, and a small number of clinics provide substantial services.²⁰ The Clinic Funding Committee submission to the Review concludes that, “services in family, criminal, and general civil are generally provided only where clients have little access to other legal services, primarily in remote areas, such as along the James Bay coast”.²¹

Some clinics also address systemic criminal and family law issues. For example, several clinics have begun to provide victim-witness supports to abused women, and in this role have worked actively to improve the criminal justice system's response to wife abuse (for example, working with local Crowns to provide information about conditions for bail releases). Others have undertaken significant systemic work around policing and its impact upon the populations they serve: the homeless, youth, blacks, psychiatric survivors. Some clinics, particularly since the recent reduction in certificates, have begun to provide an increasing number of services in the family law area: at least one clinic has created a family law duty counsel clinic; others have begun to provide informational sessions on family law.

With these statistics in mind, it is possible to imagine a limited role for clinics in the delivery of criminal, family, or immigration and refugee law services, particularly at the informational or systemic level, should an individual community board conclude that these services represent an area of community need.

There are, however, many reasons why clinics should not assume a significant role in direct client representation in criminal and family law matters: If clinics were required to provide these services, community governance would be threatened. It is difficult to see a role for a community board in cases pitting one community member against another, or possibly against a segment of the community. There can also be either a conflict of interest or serious practical difficulties if the clinic is the only legal resource available to advise both accused and victim, to advise both “sides” in a custody case, or to act for a community member who then becomes witness to another matter where another community member would like representation. Finally, we are concerned about a clinic's ability to supervise, establish priorities for, and assure the quality of criminal, family, and refugee law services when that represents only a limited part of that clinic's otherwise specialized mandate.

We have concluded that general-service clinics should, as a general rule, not have a mandate to provide direct case representation in criminal, family, or immigration and refugee law matters: Clinics should, however, be allowed to provide other kinds of services in these areas, where such services are consistent with their “poverty law” mandate and appropriate safeguards are in place to ensure that these services do not overwhelm the clinic's “poverty law” services. Some clinics could deliver limited case-representation services in exceptional circumstances (such as geographic remoteness and/or lack of other

²⁰ See generally, Bogart and Meredith, *supra*, note 12, Vol. II, this report.

²¹ Clinic Funding Committee submision to the Review at 4.

available service providers) if such services are assessed as a community priority. Specialty clinics could and should provide services (including case representation) in these areas if such services would support their focus on systemic issues or would support their client community.

In the long run, we believe that these issues will be of decreasing importance to most clinics. Our recommendations on the subject of criminal, family, and immigration and refugee law legal aid services, if properly implemented, should address the most pressing legal needs in these areas.²²

(f) COMPLETION OF THE COMMUNITY CLINIC SYSTEM

Earlier, we identified several “gaps” in the distribution of general-service clinics in Ontario. Despite the clinic system's proven success in addressing “poverty law” needs, many communities in the province simply have no access to community clinics, and those which do have clinics generally require additional resources to meet present demand. This situation contradicts the principle that a full range of legal aid services should be accessible to all Ontarians. It is simply unfair that some Ontarians should have access to this important service while others do not. Consequently, we recommend that the authority governing a reformed legal aid system in Ontario should make the completion of the geographic coverage of general-service clinics across the province a key priority.

In addition to general-service clinics, we believe that there are many reasons to expand the specialty-clinic system. The success of specialty clinics such as the Advocacy Resource Centre for the Handicapped, the Advocacy Centre for the Elderly, and Community Legal Education Ontario, to name but a few, have proven their ability to deliver high-quality, cost-effective services for their target populations.

Although the potential range of specialty clinics is quite broad, we have identified one such clinic which we believe should receive consideration—a specialty clinic to provide comprehensive legal services for Aboriginals living in urban areas and on nearby reserves. As outlined in the background paper prepared for the Review by Jonathan Rudin, a form of specialty clinic (potentially called “Aboriginal Legal Services Centres”) would be well-suited to provide this particularly vulnerable population with accessible, community-based, flexible, high-quality, and multifaceted legal services.²³ These Centres could be integrated with local Aboriginal Friendship Centres. If appropriate, consideration should be given to developing this model in northern Ontario also.²⁴

As part of its strategic-planning process, we recommend that the legal aid authority consult with current clinics, community groups, service providers and interested individuals in order to determine which specialty clinics should be introduced and the process by which to introduce them.

²² It must be noted, however, that the framework we have proposed for delivering services in those areas may involve clinics. For example, it may make sense to co-locate a family Staff Office with a community clinic.

²³ J. Rudin, “Legal Aid Needs of Aboriginal People in Urban Areas and On Souther Reserves”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

²⁴ See Donald Auger, “Legal Aid, Aboriginal People, and the Legal Problems Faced by Persons of Aboriginal Descent in Northern Ontario”, a background paper prepared for the Ontario Legal Aid Review, Vol. II, this report.

5. RECOMMENDATIONS

1. A revised *Legal Aid Act* should include an explicit mandate to provide “poverty law” services.
2. The community clinic model should be retained as the primary means of delivering “poverty law” services in the province.
3. The independent community board of directors model for individual clinics should be retained.
4. The legal aid authority should make training of community-clinic board members a high priority.
5. The unit of the legal aid authority responsible for clinics should develop infrastructures designed to support community boards, including assistance in the areas of fiscal management, labour relations, conflict resolution, and technical support. This unit should facilitate the development of board “best practices”, mentoring opportunities, access to experts, and improved communication between community boards.
6. The clinic system’s “Quality Assurance Program” should be pursued vigorously. The clinic system should continue its current efforts to regularize data collection across the province.
7. Individual clinics and the overall clinic system should initiate a multiyear strategic-planning process. This process should include an assessment of the current and likely future demand for “poverty” law services; an evaluation of the strengths and weakness of the system to meet that demand; the development of programs or strategies designed to create or improve the coordination of services and skills within the system; and the development of performance measures against which the achievement of those objectives can be assessed.
8. The Executive Director of each individual clinic should sit on the Area Committee of the administrative unit of the legal aid authority in his or her area. The Area Director, or his or her designate, of each administrative area within the legal aid authority should be a member of the board of directors of the clinic in his or her area.
9. As a general rule, the general service clinics should not have a mandate to provide direct case representation in criminal, family, or immigration and refugee law matters. However,
 - (i) such clinics should be allowed to provide other kinds of services in these areas where such services are consistent with their “poverty law” mandate and appropriate safeguards are in place to ensure that these services do not overwhelm the clinic’s “poverty law” services, and
 - (ii) they should be allowed to deliver limited case-representation services in exceptional circumstances (including geographic remoteness and/or lack of other available service providers) if such services are assessed as a community priority.

10. Specialty clinics could and should provide services (including case representation) in these areas if such services would support their focus on systemic issues or would support their client community.
11. The legal aid authority should make the completion of the geographic coverage of the general service clinic system a key priority. The legal aid authority should consult with current clinics, community groups, service providers, and interested individuals in order to determine the need for any new specialty clinics.

REFUGEE AND IMMIGRATION LAW¹

Most legal aid services in the field of immigration and refugee law are dedicated to providing representation for refugee claimants in quasi-judicial hearings before Members of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB). A limited number of Plan certificates are also issued to fund judicial review applications before the Federal Court (Trial Division) in respect of negative refugee determinations by the CRDD. Up until April 1, 1996, the Plan issued a limited number of certificates to permanent residents of Canada subject to deportation proceedings before the Immigration Appeal Division (IAD) of the IRB. A few certificates were also issued to permanent residents who had failed in their applications to sponsor family members. Certificates for IAD proceedings appear to have comprised fewer than five percent of the total immigration and refugee certificates issued. Due to cutbacks in funding, the Plan has ceased issuing certificates for non-refugee-related immigration matters altogether.

In the early 1980s, the number of inland refugee claimants in Canada numbered 5,000-7,000 per year. The numbers steadily grew, and *Singh v. Minister of Employment and Immigration*² in 1985 imposed a *Charter of Rights and Freedoms* entitlement to an oral refugee-determination hearing. With the oral hearing came a heightened demand for legal representation, and the annual cost to the Plan rose from tens of thousands of dollars to \$1.2 million by 1989.

Beginning in 1986, the number of claimants arriving in Canada (and Ontario) escalated dramatically. In 1989, the federal government established the IRB, and instituted a two-step hearing process for determining refugee claims. Through a project known as the “designated counsel” program, the federal government funded 100 percent of the legal aid costs for the first stage of the process (“the credible basis hearing”); the second stage was funded through the usual sources available to the Plan, but the cost was relatively low because most of the legal work on a claim was done in the course of preparing for the credible basis hearing. In 1994, the first stage was eliminated, and specific federal funding along with it, shifting all the costs of legal representation to the provincial legal aid system.

The number of certificates issued in immigration and refugee law peaked in 1992, at 33,442. They have declined every year thereafter, and in the 1995-96 fiscal year (before the

¹ This chapter draws extensively on a research paper prepared for the Legal Aid Review by Audrey Macklin, “Report on Immigration and Refugee Law”, see Vol. III, this report.

² *Singh v Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

tariff cutbacks of April 1, 1996), only 8,337 certificates were issued. After April 1, 1996, the number of certificates issued has declined even further. The demand for legal aid certificates by refugee claimants has recently diminished, with a sharp decline in the number of refugee claimants entering Ontario (and Canada). However, the cost to the Plan of legal aid does not track the decline in numbers. Despite dwindling numbers of certificates issued after 1992, the cost per certificate escalated sharply. Part of this cost increase was attributable to the elimination of the federally funded first-stage hearing, and part to the impact of Federal Court jurisprudence on the process and content of refugee determinations. In turn, the IRB became more demanding of lawyers in terms of legal argument and documentation, and lawyers docketed more time preparing for hearings. As a proportion of total expenditures on legal aid certificates, refugee and immigration certificates have declined consistently since 1993. They peaked at 12 percent in 1993, and tapered off to seven percent (of a smaller total) by 1996.

This chapter discusses the coverage of refugee and immigration matters under the Ontario Legal Aid Plan, the effect of recent cuts in services, the need for legal representation in this area, and current and proposed delivery models. As a general proposition, we recommend that the general approach of the legal aid system to refugee and immigration matters should be consistent with the general principles advocated in this report. Thus, it is our view that the legal aid authority should establish a needs-assessment and priority-setting process for application by local decision-makers, and an appeals process, in relation to refugee and immigration matters. In this chapter, we offer a number of more specific recommendations for enhancing service delivery in the refugee and immigration law context.

1. THE NEED FOR LEGAL REPRESENTATION

(a) REFUGEE DETERMINATIONS

Refugee claimants risk return to a country where they could face imprisonment, torture, or death because of who they are or what they believe. Some permanent residents in Canada face deportation to a country they may have left as a child, and where they have no friends, family, or community. Other permanent residents must contemplate indefinite separation from spouses and children if sponsorship applications fail.

Refugee determination is meant to transpire in a non-adversarial context. Unless a representative of the Minister of Citizenship and Immigration intervenes (which is rare), no one in the hearing room has an institutional interest in opposing a valid refugee claim. Though, unlike refugee determination, immigration proceedings are adversarial, they still take place in an administrative setting which is ostensibly less formal and more accessible than a conventional courtroom. In principle, the system should be relatively accessible and non-threatening to claimants and applicants.

In practice, the refugee determination process can be frightening and bewildering. Claimants come from radically different cultural, linguistic, class, and educational backgrounds. The system requires that they compartmentalize their experience into the components of a relatively narrow legal definition, recount their story in a format that will respond to the needs of decision-makers, and establish themselves as credible according to legal and often cultural norms that are often utterly alien to them. Consistency and plausibility are the primary indicators of credibility relied upon by decision-makers. Claimants may, for a variety of personal and cultural reasons, be utterly disoriented by the process and the standards

against which they will be judged, and distrustful of state processes, given prior experience in their countries of origin.

The role of legal counsel in this context includes, but is not limited to, conventional legal representation. Lawyers must also establish a trust relationship with their clients that can overcome the fear, mistrust, and possible disinformation that clients bring to the proceedings.

(b) IMMIGRATION PROCEEDINGS

With respect to immigration matters, such as deportation proceedings, the fact that proceedings before an IRB Adjudicator or before Members of the Immigration Appeal Division (IAD) of the IRB are formally adversarial lends force to the need for professional representation where stakes are high. In addition, certain matters involve a degree of legal complexity which can be properly addressed only by someone with legal skill and experience. Similarly, judicial review, whether in relation to a refugee or immigration matter, typically requires legal expertise.

(c) DETAINEE ISSUES

At any given time, a number of immigrants and refugee claimants are currently detained at the Celebrity Inn in Toronto, Metro West Detention Centre in Toronto, and elsewhere in the province. Some are brought into detention directly from the Port of Entry on suspicion that their identity documents are fraudulent. Some of these persons are refugee claimants; others are persons who say they are visitors or students, but are disbelieved. Other people are detained out of suspicion that they will try to enter the United States illegally through Canada, or are suspected of criminality. Another class of detainees have been picked up in Canada. These include persons with failed or abandoned refugee claims, visitors and students who have overstayed their visas, potential refugee claimants who entered illegally and went underground, and refugee claimants or permanent residents who committed criminal offences in Canada and are subject to deportation as a result. Certificates are rarely, if ever, granted for detention reviews. Community legal workers, law students, and on occasion, private lawyers have furnished advice and representation, but the arrangements are patchwork and unsatisfactory in relation to actual representation at detention reviews.

A serious and unaddressed need exists with respect to legal representation for detainees. Clearly, not all people in detention would qualify for legal representation in respect of the immigration process to which they are subject, such as deportation for overstaying a visa. On the other hand, even summary advice in such cases can enable detainees to make informed choices about their options, including a decision to return to their country of origin rather than remain in detention with little prospect of success on the merits of the case. As for detained refugee claimants, those who are released could enter the general pool of claimants who apply for legal aid.

There appears to be a consensus that whoever provides representation to detainees, it ought to be a designated person or persons who do so on a consistent and regular basis. This is critical for purposes of establishing familiarity and competence in dealing with the institutions and the staff who run them. Whether this service is provided by counsel from a community legal clinic, or from the Refugee Law Office (RLO), or by duty counsel, is less critical than simply ensuring that the service is provided.

2. MODELS OF SERVICE DELIVERY

In Toronto, most CRDD and judicial review cases are handled by the private bar through the certificate system. The Refugee Law Office, set up as a pilot project in 1994, represents a very small percentage of refugee claimants who are issued certificates in Toronto. In Toronto, community legal clinics handle a relatively small number of refugee claims, but do almost all the small amount of immigration work supported by the Plan in Toronto. In Ottawa, refugee claims are split between the private bar and community legal clinics. Community clinics in Ottawa do a significant amount of refugee and immigration work. Legal Aid of Windsor and Community Legal Services of Niagara South also undertake a proportionally significant amount of refugee work, taking into account the relatively low demand for services in those areas. The private bar deals with immigration and refugee matters in the Fort Erie-Niagara region.

(a) JUDICARE

The process leading to the denial of legal aid certificates to some refugee claimants raises some concerns. The Plan assesses claimants according to their financial means and those of their family and the merits of their case. In principle, no one objects to screening claimants for financial eligibility. Some criticize any assumption that the extended family may be able or willing to finance the applicant's legal costs. According to the Plan, only two to four percent of rejected applicants have been refused on the grounds that family members could finance legal representation. Ultimately, it is questionable whether such a small return justifies the administrative effort expended by lawyers and the Plan to pursue this avenue of payment, compounded by the additional uncertainty and stress imposed on the applicant.

After initially screening a file, the Plan has three options: first, issue a full certificate; second, reject the applicant for lack of merit; third, issue a three-hour "opinion certificate" which enables counsel to draft a letter to the Plan explaining the merits of the case, after which the Plan will decide whether to issue a full certificate. The practice of issuing opinion certificates appears to yield savings in a negligible percentage of total applications by refugee claimants for legal aid and imposes time, financial, personal, and administrative costs on lawyers, applicants, and the Plan. The legal aid authority should consider whether to continue opinion certificates, or whether it would be more cost effective to simply issue full certificates in all cases where it would currently grant an opinion certificate.

Individuals whose refugee claims are refused have fifteen days to file a notice of application for leave to seek judicial review by the Federal Court (Trial Division). Currently, leave to seek judicial review is granted to well under ten percent of all applicants. Failed refugee claimants are unable to deal with judicial review without expert assistance. Typically, a lawyer can obtain an opinion certificate from the Plan, which pays for four hours' time to prepare an opinion regarding the grounds for judicial review. It usually takes a week to ten days to receive the certificate. This means that the lawyer must file notice before receiving an opinion certificate. The decision about whether to fund judicial review is made by a three-person Area Review Committee for civil appeals. Not all members of the committee are lawyers, much less lawyers with immigration experience. Reliance on local Area Committees with disparate degrees of expertise and infrequent meeting schedules means that decisions about the granting of certificates for judicial review are neither timely nor predictable. Instead of having local Area Committees responsible for civil legal aid deal with judicial review of immigration matters, it may be preferable to constitute a single committee mandated to deal

only with judicial review/appeals in immigration and refugee matters throughout the Greater Toronto Area. This committee could be comprised of people with expertise in immigration and refugee law, and be able to respond on an *ad hoc* basis.

Failed refugee claimants have two avenues of recourse in addition to judicial review. They can apply for consideration under the Post-Determination Refugee Claimants in Canada (PDRCC) program. This assessment is performed by the Department of Citizenship and Immigration. The criteria for evaluation focus on whether claimants would be at risk should they return to their countries of origin, notwithstanding their inability to meet the Convention Refugee definition. Claimants with \$500 can also apply for humanitarian and compassionate (H&C) consideration pursuant to section 114(2) of the *Immigration Act*. Relevant criteria under H&C include settlement prospects in Canada, economic self-sufficiency, and family or personal relationships in Canada. Briefly put, PDRCC looks at risk of return, while H&C examines ties to Canada. The Plan currently funds neither H&C nor PDRCC applications. A few community legal aid clinics may handle applications for those claimants who live within the clinic's catchment area. Vigil, a non-governmental organization with one paid staff member, also provides free assistance to failed refugee claimants who wish to submit H&C or PDRCC applications.

In order to maximize the failed refugee claimant's options, it seems sensible that a lawyer should be able to consider all potential recourses. Rather than confine the Plan's funding to judicial review, legal aid administrators should consider modestly expanding the initial "opinion letter" funding for judicial review applications and permit the following:

1. opinion letter on judicial review, and/or
2. application for PDRCC, and/or
3. application for H&C

Upon review of the file, counsel would decide how to allocate the available time, in accordance with which basis of post-claim review was most promising.

The situation is now pressing with respect to removal of permanent residents. The Plan has not funded these cases since April 1996. Where an applicant does not live within the catchment area of a community clinic that does immigration work, we propose that the legal aid authority consider resuming screening applicants with a view to funding financially eligible applicants who have been in Canada since childhood or adolescence and have little connection to their country of citizenship. These would appear to be the cases where the stakes are the highest, and where the consequences of removal of a permanent resident are most severe.

In 1995, Parliament enacted Bill C-44, an Act to amend the *Immigration Act*. Among the changes it introduced were provisions permitting the Minister of Citizenship and Immigration to declare a refugee or permanent resident a danger to the public. This power is exercised in the case of individuals who have acquired a criminal record in Canada since their arrival. The current procedure for issuing a certificate of public danger is rudimentary and opaque. An employee of Immigration Canada forms an opinion that an individual poses a public danger, and forwards the person's file to a delegate of the Minister. In the meantime, the subject is notified in writing that he or she has fifteen days to file any information relevant to the Minister's determination. This reply is forwarded to the Minister's office, where the delegate renders a decision without reasons. There is no appeal from the decision. The issuance of a "public danger" certificate will have drastic consequences for a refugee or permanent resident,

resulting in removal from Canada. Most clinics do not take on immigration cases involving criminality. In such circumstances, legal assistance in drafting a submission to the Minister may be critical. A certificate to prepare a “public danger” submission could be issued for a limited number of hours to those for whom the consequences of removal are most serious. Refugees and those who have been in Canada since youth appear the likeliest candidates on this test.

Issues of quality control are a significant concern in the provision of legal aid in immigration and refugee matters. The majority of lawyers who do legal aid work on behalf of refugee claimants, refugees, and immigrants are dedicated people of integrity. They provide high-quality services and, through regional specialization, develop economies of scale and expertise in dealing with claims from certain countries.

Unfortunately, this is not true of all immigration and refugee lawyers. Consultation with non-governmental organizations, individual refugee advocates, and other lawyers confirm that a small but significant number of immigration and refugee lawyers are incompetent or unethical. Refugee claimants are a particularly vulnerable class. The subjects of these complaints are almost invariably lawyers from the private bar.

The Investigations and Complaints Department of the Plan investigates possible abuses of the Plan by lawyers. The department does not deal with competence issues, but rather with complaints that certain lawyers may be overbilling or otherwise defrauding the Plan. Despite the small size of the immigration bar relative to other specialized areas of legal practice, they are disproportionately represented among lawyers investigated, monitored, or prosecuted. Of forty-three lawyers investigated in the past year, seventeen were immigration and/or refugee lawyers. The Plan currently monitors all work done by twenty-seven lawyers, of whom sixteen are immigration and/or refugee lawyers.

From time to time, refugee advocates and other lawyers have reported various incidents of unethical or illegal conduct to the Plan and/or the Law Society. From their perspective, neither body has responded in a timely or interested fashion. The Plan has expressed interest in formulating standards of practice for immigration and refugee lawyers, but the Law Society maintains that this task falls within its own jurisdiction. To date, no standards have been set.

The following ideas for quality control have emerged through consultation and can best be explored and developed through meetings among the bar, the IRB, the Law Society, the Plan, non-governmental organizations, and community/ethnic organizations.

(a) Inform Claimants

- issue multilingual pamphlets available at Plan offices; take out ads in local ethnic newspapers explaining how legal aid works, what clients are entitled to expect from lawyers, prohibited conduct by lawyers, and so on
- make information available in the languages spoken by refugee claimants; to the extent that clients must rely on someone else to translate the information, claimants are vulnerable to unscrupulous intermediaries
- provide a number/contact person to whom complaints/questions can be directed

(b) Formulate Standards of Conduct

- formulate a Code of Conduct for the practice of immigration/refugee lawyers, including such matters as disclosure, interaction with clients, billing, and preparing vs. “coaching”

(c) Coordinate Investigation and Disciplinary Efforts

- use community organizations, the bar, and the IRB to assist in identifying priorities for investigation and evidence gathering
- drop lawyers from the Plan panel who do not comply with the Standards of Conduct

(b) BLOCK CONTRACTING

An alternative delivery model to judicare that still utilizes the private bar is to contract out blocks of cases (*e.g.* twenty-five) from the same country/region to lawyers for a pre-set fee, and allow counsel to tender bids based on quality assurance. On one variant of this model, the fee per case would be set in advance through consultation with the bar, and would not be the subject of bidding. Rather, counsel would bid for the contract based on the pre-set fee. The criteria for selection would be based on quality assurance, not price. Prior experience in the field, expertise in the particular country, a documented plan of action (which may involve use of supervised paralegals), prior history with the Plan, and so on, would all be relevant criteria.

The goal would be not to have lawyers bid down the cost of legal services and grant the contract to the lowest bidder. Such a mechanism may drive down the quality of service in an area of practice where quality control is already a major concern. The goal would be to ensure high quality services at the outset by implementing a selection process that identifies those lawyers who are able and willing to provide competent and efficient legal representation. Block contracting may generate administrative cost savings, so that contracting need not pay lawyers significantly less than what they would average under the tariff. However, resources would have to be devoted to monitoring the quality of services delivered by the lawyers selected. Major challenges to block contracting are implementing a tender and selection mechanism that will appear fair to the bar³, and the fact that the process, depending on how it is structured, may deprive claimants of the ability to choose their own counsel.

(c) COMMUNITY LEGAL CLINICS

Community legal clinics set their own priorities within their respective catchment areas. The needs of a geographic community vary from one location to another, and clinics must decide how to allocate their limited resources in accordance with the competing demands within their community. Thus, the availability of community legal services to immigrants and refugee claimants depends on decisions made by the board of a clinic.

All three Ottawa clinics have done more than ten percent immigration/refugee work in the last three years. Of twenty-four general services community legal clinics in greater Toronto, ten have done more than ten percent immigration/refugee work in the last two years. Another

³

It would probably be necessary to set up a committee that includes members of the bar, the Plan, and others to select from among the tenders. The entire process, including criteria for selection, should be developed in collaboration with the bar.

three have done more than forty immigration/refugee cases in either 1995 or 1996, but this amounted to less than ten percent of their total case load. Legal Aid of Windsor also handled a significant number of immigration/refugee files, bearing in mind that the demand in Windsor is relatively low.

On occasion, community legal clinics will take on refugee claimants who have been rejected by the Plan. Some of these refugee claims are successful before the IRB. Community legal clinics perform a variety of functions above and beyond representation in immigration/refugee proceedings before the IRB. They may assist in PDRCC applications, advocate for their clients with Immigration officials, or make H&C applications. Community legal clinics, unlike most private lawyers, also make use of supervised paralegals (community legal workers). Depending on their expertise, community legal workers can supply clients with a significant degree of assistance, as well as public education.

Aside from individual case work, community legal clinics are also active in public legal education, and advocate for law reform in various areas. The Ontario Interclinic Immigration Working Group (ICIWG), a network of clinic lawyers and community legal workers doing immigration/refugee work, shares information and strategies with its members, engages in consultations about matters affecting immigrants and refugees, and coordinates law-reform efforts. These are the strengths of community legal clinics. Their major weakness is that not all clinics do such work, and even clinics that do immigration and refugee work may offer a limited range of services that are not covered by the private bar or the Refugee Law Office. An individual with an immigration or refugee problem who cannot get a legal aid certificate cannot get legal assistance if immigration or refugee cases are not a priority for the local community clinic.

(d) REFUGEE LAW OFFICE

The Refugee Law Office (RLO) was established in 1994, with a director, four lawyers, six supervised paralegals, and three support staff. It was constituted as a pilot project to compare cost-effectiveness and quality of service between a staff clinic and the judicare model. An ongoing evaluation of the RLO according to these criteria is being conducted. In order to conduct an effective comparison, the mandate and operations of the RLO were designed to parallel the activities of the private bar. The RLO handles only refugee cases before the CRDD and subsequent judicial review. It does no other immigration work. The employment of multilingual paralegals, it was contemplated, might enable the RLO to allocate certain components of case preparation to paralegals, whose services are less expensive than those of lawyers. Because of their multilingual capabilities, paralegals also interpret and translate. Clients must obtain a legal aid certificate from the Plan in order for the RLO to serve them. A critical pre-condition for the establishment of the RLO was that it not interfere in any way with the principle of "counsel of choice". This meant that the Plan could not direct clients to the RLO. At present, if an applicant for legal aid does not have a lawyer, the Plan will supply a list of counsel that includes the RLO, but will go no further.

Preliminary results from the RLO evaluation indicate that RLO clients strongly praised it. Clients appreciated the multi-ethnic/multilingual mix of staff, and perceived benefits in an office that specialized in refugee cases. In short, the quality of service currently provided by the RLO is more than satisfactory for its clients. This is not surprising, in light of the fact that the lawyers hired by the RLO were among the most highly respected members of the private bar. The most serious problem with the RLO is that at no time has it been able to attract a

sufficient case load to operate at full capacity. Moreover, the projected cost savings to the RLO of utilizing paralegals in various stages of case preparation have not materialized. One reason is that the RLO assumed that paralegals would be able to do much of the work involved in expedited claims. The IRB utilizes an expedited process for claimants from countries with very high acceptance rates, or individual claimants with a profile that suggests a high likelihood of success. Instead of proceeding to a full hearing, expedited claims are determined on the basis of a relatively short (thirty to forty-five minute) interview with the Refugee Hearing Officer (RHO). The premise that the Toronto IRB would continue their practice of expediting claims proved unfounded. In recent years, and in contradistinction to every other IRB office in Canada, both Toronto IRB offices have virtually ceased expediting claims.

RLO lawyers and staff spend much more time per client than do members of the private bar. As of May 1996, the cost per RLO case was approximately 170 percent of the cost per case for the private bar working on Plan certificates. In 1996/97, the RLO received 119 CRDD certificates, or 3.12 percent of the total number of CRDD certificates issued in Toronto. During the same period, it obtained around 20 judicial review certificates, or about 4.5 percent of the total. The main hypothesis to explain why the RLO has not been able to attract a sufficient number of clients relates to the method by which refugee claimants choose lawyers. It appears that "word of mouth" is a key factor in refugee claimants' choice of counsel. According to the RLO evaluation, 60 percent of clients who use a private lawyer obtain the referral from a previous client, a relative/friend, a fellow national, or a translator. Only 25 percent of the RLO clientele obtained a referral from the same sources. While the RLO has made efforts to publicize its existence, it is arguable that it underestimated the need for systematic and regular outreach.

The restricted mandate of the RLO precludes it from using its resources to meet needs which are currently unaddressed or under-addressed by the private bar and community clinics. Chief among these are the needs of detainees. Although the RLO can represent refugee claimants in detention, its mandate does not permit it to represent other detainees. As noted earlier, effective representation of detainees requires that a limited number of persons be routinely assigned to the detention centres. Such individuals can develop the familiarity and ongoing relationship with the institutions that are required to facilitate representation, summary advice, information, and advocacy on an ongoing basis. The RLO is not currently organized to provide this service, but could do so if its mandate were expanded. Similarly, the RLO could also take on certain other immigration matters, such as deportations or "public danger" certificates, subject to time and resource availability. In so doing, the RLO could "fill in the gaps" for persons who fall outside the catchment areas of community legal clinics that do immigration and refugee law.

The assumption that the relationship between the RLO and the private bar is primarily competitive also overlooks the opportunities for the RLO and the bar to complement each other. For example, the paralegals at the RLO possess the expertise and experience to provide high-quality research with respect to a number of source countries. It is not always efficient for lawyers to employ paralegals themselves. Lawyers may end up doing research on their own, for which they bill the Plan, or which they do for free. Paralegals at the RLO could provide research services to the private bar. In addition, the more research funnelled into the RLO, the RLO will be better able to consolidate a body of research for use by all counsel. This could prevent the needless repetition of effort and the expense incurred by lawyers working in isolation.

An encouraging example of an apparently well-functioning Staff office in the immigration context is the B.C. Immigration Law Clinic (ILC), which was set up in Vancouver in 1995. Three lawyers, one paralegal, and one support person staff the clinic. It handles about 10 percent of all refugee claims in Vancouver. Its mandate differs from that of the RLO, and it provides a useful illustration of different ways in which Staff Offices can function. In British Columbia, certificates are issued for inquiries, detention reviews, deportation, and refugee claims, but not for sponsorship appeals. The ILC is located in the same building as the B.C. Legal Services Society (the B.C. equivalent of the Plan). The Legal Services Society issues certificates for private lawyers as well as the ILC. It does not direct clients to the ILC, but the fact that the ILC is one floor above the Legal Services Society office provides a practical incentive to legal aid recipients at least to "check out" the clinic. The ILC handles all immigration matters covered by legal aid. Law students handle sponsorship appeals because these are not covered by the legal aid tariff. In addition, students deal with other legal problems of immigrants and refugees, such as landlord and tenant, wrongful dismissal, and income security. The ILC has no difficulty sustaining a busy case load. Indeed, the director indicated that the ILC could handle cases more efficiently if it had one more paralegal and support staff. About half to three-quarters of the case load consists of refugee claimants. No systematic evaluation of the ILC has been undertaken, and thus it is not possible to comment on the cost-effectiveness of the ILC, although it clearly has been more effective than the RLO.

In a new legal aid system, the RLO could undertake a more systematic and concerted strategy of public education and publicity. This might include establishing regular contact with shelters, community organizations, etc. Establishing linkages with various communities seems indispensable to the effective operation of any refugee law practice. The RLO could provide on-site summary advice, including information about how to apply for legal aid. This type of work takes significant amounts of time, often outside regular working hours, and requires transportation.

Another proposal, which is patterned after Staff Offices in Manitoba and Quebec, is to shift all initial screening for legal aid certificates in immigration and refugee matters in Toronto to the RLO. Applicants who make their application at other area offices would continue to be screened in the usual fashion. Under this model, the RLO would assume responsibility for screening all applicants in the Toronto area for legal aid and making recommendations on eligibility for legal aid to the Area Director. Applicants who already had counsel and otherwise qualified would be issued a certificate for their counsel of choice. Applicants without counsel who qualified for legal aid would be given the option of utilizing access to the services of the RLO.

There are several advantages to this proposal. First, the staff performing the screening at the RLO would have regular involvement with refugee cases. Their experience and exposure to the daily practice of refugee law gives them an advantage in initial screening for eligibility (particularly for merit).

Second, the fact that applicants for certificates would have to physically go to the RLO provides the RLO with automatic visibility and exposure to the various communities of refugee claimants. This may, in turn, result in more claimants choosing to utilize the services of the RLO, without directing them or otherwise interfering with the principle of counsel of choice.

3. RECOMMENDATIONS

1. The legal aid authority should establish a needs-assessment and priority-setting process for application by local decision-makers, and an appeals process, in relation to refugee and immigration matters in accordance with the principles set out in this report.
2. With respect to the issuance of legal aid certificates for refugee determinations, the legal aid authority should consider whether the current process of screening claimants to determine whether family members could finance legal representation is cost-justified. Similarly, the issuance of “opinion certificates” to enable counsel to draft a letter to the Plan explaining the merits of the case rather than full certificates should be reviewed to determine whether this is cost effective.
3. In the event of a negative refugee determination, the legal aid administrators should consider modestly expanding the initial “opinion letter” for funding for judicial review and permit: (a) an opinion letter on judicial review; and/or (b) application for consideration under the Post-Determination Refugee Claimants in Canada (PDRCC) program; and/or (c) application for humanitarian and compassionate consideration.
4. The legal aid system should provide legal aid services for detainees, at least with respect to an initial detention review, through the Refugee Law Office.
5. With respect to deportation proceedings, legal aid should resume screening applicants with a view to funding financially eligible applicants who have been in Canada since childhood or adolescence, and have little connection to their country of citizenship if this qualifies as an overall priority for the legal aid system. Similarly, legal aid certificates for preparation of certificate of “public danger” submissions to the Minister of Citizenship and Immigration should be considered for a limited number of hours to those for whom the consequences of removal are the most serious (refugees and those who have been in Canada since their youth).
6. The legal aid authority should consider whether there are cost savings to be realized from contracting-out blocks of cases from the same country or region to lawyers or law firms for a pre-set fee (to be determined in consultation with the bar), and allow counsel to tender based on quality-assurance commitments.
7. The legal aid authority should adopt a range of quality control strategies, including: (a) information vehicles explaining to claimants how legal aid works, what clients are entitled to expect from lawyers, and providing a number/contact person to whom complaints/questions can be directed; (b) formulating standards of conduct for the practice of immigration/refugee lawyers; (c) coordinating investigation and disciplinary efforts.
8. The mandate of the Refugee Law Office, established as a pilot project in 1994, should be substantially extended to include not only refugee determinations, but detention reviews, deportation proceedings, applications for consideration under the Post-Determination Refugee Claimants in Canada program, applications for humanitarian and compassionate consideration, and certificates of “public danger” submissions. In addition, all initial screening for legal aid certificates in

immigration and refugee matters in Toronto should be undertaken by the Refugee Law Office (renamed the Immigration Law Office), with successful applicants for legal aid then having the choice of using the services of the RLO (ILO) or private counsel.

“OTHER” CIVIL LAW LEGAL AID SERVICES

The imposition of a cap on legal aid funding has resulted in an increase in the number of people who are ineligible for legal aid in relation to a growing list of civil law matters that fall outside the mandate and resources of the clinic system. In some instances, these legal issues may have a serious impact on an individual and may be legally complex.

A number of possible options outside the traditional legal aid system are available to expand access to justice in civil law areas currently not covered by it. However, even if all of these tools are put in place, we do not believe that all of the most significant legal needs of low-income Ontarians in relation to civil law matters will be met. We are of the view that the legal aid authority should revisit the range of civil cases that historically had coverage under the Plan, and should reassess whether or not coverage should be provided to individuals in some or all matters, in light of our articulated approach to how priorities should be set where resources are limited.

This chapter describes client needs, case coverage, and existing delivery methods for “other” civil law matters. It also briefly describes additional methods for expanding legal assistance in relation to these matters, both within and outside the legal aid system.

1. THE ONTARIO CONTEXT

(a) CLIENT NEEDS

Client needs in relation to “other” civil law matters, not falling within the “poverty law” mandate described in chapter 11, vary widely. For example, consumer, utility, and debt problems have been consistently identified in the major U.S. surveys as matters of great importance to low-income people. Vulnerable elderly persons can have serious legal issues when their powers of attorneys are misused; mothers of young children who face life-threatening illnesses can have urgent needs in the areas of wills and other planning for their children. Persons injured in accidents, medical malpractice, or assaults can have legal issues arising from these events.

As well, low-income people have problems with tax credits and related issues. Marginalized workers can have serious problems understanding their rights and obligations in employment situations. Many workers, because of prohibitively expensive legal fees, do not have the means to review a dismissal by their past employers. Aboriginal organizations identified “other” civil law issues of serious importance to their community, such as small claims matters in the area of purchases of consumer durables.

(b) CASE COVERAGE

Over the past few years, certificate coverage has been eliminated for most civil law matters. For example, in September 1994, the terms of the Memorandum of Understanding (MOU) contemplated the reduction in civil law coverage by providing that

- certificates for plaintiffs in most personal injury claims will be issued to cover disbursements only except for Ontario Motorist Protection Plan mediation;
- certificates will not be issued to pursue or defend claims in relation to debt; and
- certificates will not be issued for claims concerning real estate except in very limited circumstances.

Further cuts to “civil litigation” certificates, which were approved by Convocation in August of 1995, eliminated legal services for wrongful dismissal cases and damage claims (with only disbursements still being paid). In addition, certificates are no longer available for coroners’ inquests, public inquiries and will drafting.

Currently, if civil certificates are issued, priority is given to civil cases involving sexual assault, mental health, disability benefits, parole or prison matters, and, where clinics are not available, “poverty law”, such as workers’ compensation, Social Assistance Review Board, and landlord and tenant matters.¹ In practice, due to the reduced number of certificates issued as a result of the MOU, the Plan is granting fewer and fewer certificates in these areas. In communities where no community legal clinic exists, the reduced coverage has had, of course, an even greater impact.

Table 13-1 outlines the number and cost of “other” civil cases for the Plan for the year ending March 31, 1996.

Table 13-1: Analysis of Completed Civil Law Cases, 1995-1996²

Type of Aid	Number of Cases		Total Fees and Disbursements		Average Cost	
	1996	1995	1996 (\$)	1995 (\$)	1996 (\$)	1995 (\$)
Property Actions	2,173	3,833	3,966,463	4,996,369	1,825	1,304
Damage/Negligence	1,514	2,417	2,857,518	3,769,330	1,887	1,560
Worker Compensation	810	842	961,476	840,840	1,187	999

(c) THE CURRENT DELIVERY “SYSTEM”

The reduction in legal aid coverage in the area of civil law has resulted, in some instances, in private lawyers agreeing to take cases on a speculative basis, hoping to recover fees from a judgment or settlement.³ Other lawyers are providing services in some cases

¹ Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report 1996* (Toronto: Law Society of Upper Canada, 1997), at 22.

² *Ibid.*, at 43. It should be noted, however, that these figures do not reflect the true impact of the most recent round of cuts to civil law certificates, since most of the cases paid in 1995/96 would have been issued in earlier years.

³ W.A. Bogart, Colin Meredith, and Danielle Chandler, “Current Utilization Patterns and Unmet Legal Needs”: see Vol. II, this report.

based on extended repayment schedules to cover fees and disbursements. There is also some indication of increased *pro bono* work, and flexible techniques being used by the private bar, such as agreeing to perform a limited part of the service, with the client doing the rest.⁴

Community clinics have also tried to respond to the reduction in civil law certificates, but are generally finding that they do not have the resources, in most circumstances, to provide much more than summary advice. In a number of communities across Ontario, however, there are no community clinics in place to offer assistance, in light of the reduction in the issuance of certificates in non-family civil matters.

The matters upon which some clinics provide summary advice include: employment standards and employee rights; wrongful dismissal; consumer claims; and wills and estates. Some clinics support self-representation by providing self-help kits for Small Claims Court and wrongful dismissal actions, and by providing some assistance in filling out forms (e.g., they may assist clients to complete a statement of defence to avoid a default judgment being entered against him or her). They also provide referrals to the private bar, the Lawyer Referral Service, Dial-a-Law, and duty counsel advice clinics.⁵ Student clinics represent individuals on consumer- and employment-related issues, and most student legal clinics provide representation in Small Claims Court.⁶

Yet, for many potential clients, assistance from lawyers or community or student clinics is not available. As a result, individuals are increasingly attempting to represent themselves in court and before administrative tribunals.⁷ As with other areas of law, this has resulted in a higher demand on court and administrative tribunal resources because most unrepresented clients are neither able to work their way through complex court rules and procedures, nor able to navigate processes in the courtroom.⁸

2. OPTIONS TO IMPROVE ACCESS TO JUSTICE FOR “OTHER” CIVIL LAW MATTERS

In light of the ever-growing list of unmet civil law needs, it is incumbent upon the legal aid authority, the government, and the Law Society to consider mechanisms to increase access to legal assistance for these kinds of cases. In particular, this issue must be considered by the legal aid authority in light of other delivery-model reforms and its mandate to set priorities based on the impact the matter has for the individual rather than by predetermined categories.

For instance, one could easily envision the legal aid authority applying its intake assessment and priority-setting function to “other” civil law cases. In such circumstances,

⁴ *Ibid.*

⁵ *Ibid.* The Lawyer Referral Service provides a client with the name of a lawyer who practises in the required area of law and in a convenient geographic location. The lawyer does not charge the client for the initial one-half-hour consultation. Dial-a-Law provides free bilingual information on a wide variety of topics, using brief tape-recorded messages in everyday language.

⁶ *Ibid.*

⁷ *Supra*, note 3.

⁸ *Ibid.*

the Area Office could determine financial eligibility and, based on the issues raised by the case and the individual circumstances of the client, determine whether the issue is a priority for legal aid and, if so, how the legal need could be met using a range of delivery options. Possible options include:

- private bar (possibly through a referral for a contingency-fee arrangement, with intake officers providing advice on the proposed arrangement to protect vulnerable clients; perhaps through the lawyer referral program; or maybe on a certificate);
- contingent legal aid fund (administered by the legal aid authority or another body: see description below);
- community clinic (where summary advice, or public legal education or representation may be available);
- duty counsel advice clinic (possibly within the intake office, where summary advice, help with forms, and possibly some representation in straightforward matters that fall outside of the “poverty law” areas covered by the clinics could be offered); and
- public legal education and self-help kits.

If, however, the legal aid authority, because of other legal case priorities, is unable to resume services in this area, it should work with the Law Society, the provincial government, and the bar associations to promote alternative options enhancing services in this area.

The following section sets out possible methods of improving access to justice in “other” civil law matters.

(a) CONTINGENCY FEES

Traditionally, lawyers are remunerated for their services in civil actions at an hourly rate which is payable to the lawyer whether or not the action succeeds. Under a contingency-fee arrangement, a lawyer accepts a client’s case on the basis that the lawyer is paid only if the case is successful. The lawyer bears the risk of not being paid for the litigation in return for a share of the client’s settlement or court award if the case is won, although the client bears the risk of having to pay the other side’s costs if the case is lost.

There are three types of contingency-fee arrangements:

- *Speculative Fees*: These are pure “no win, no fee” arrangements, where payment is conditional upon winning the case.
- *Conditional Fees*: A successful lawyer receives fees enhanced by an “uplift” percentage higher than the regular rate. This is the system used in England for a limited number of suits, and in Ontario for class actions only.
- *Contingency Fees*: A successful lawyer gets a percentage of the plaintiff’s damage award. This is the dominant U.S. model, and is also used in British Columbia, among other Canadian jurisdictions. The award may be a fixed percentage, or a series of increasing or decreasing percentages, depending on the final damage

award and the stage at which the dispute is resolved. Such tiers may be set by statute or regulation, and may differ according to the kind of claim.

Contingency-fee arrangements are of practical value only where a plaintiff is claiming monetary relief and where the amount in issue is large enough to cover the fees and leave a return for the client. Such arrangements have the potential to improve access to legal representation in a small number of civil matters for which legal aid is no longer generally available. These matters include wrongful dismissal, personal injury, medical malpractice, some consumer litigation, real estate, and estates matters.

Contingency-fee arrangements have recently been permitted in England and Wales. They are limited to personal injury, fatal accidents, insolvency, and cases before the European Commission and the Court of Human Rights. Lawyers may charge an increase in their fees, up to a maximum of 100 percent, based on the chance of winning. The success fee and other details of the contingency arrangement must be specified at the outset. The lawyer must also outline the risks of litigation to the client.

The English scheme differs from the standard U.S. model in one regard. Under the English conditional-fee arrangement, the amount a lawyer receives is not related to the total damages awarded to the client. Instead, the lawyer receives the increased hourly amount only if the case is successful.

Contingency fees are allowed throughout the United States and in every Canadian province except Ontario, where they are prohibited by the *Solicitors Act*⁹ and the *Champerty Act*.¹⁰ The Law Society and the Canadian Bar Association are both in favour of allowing contingency fees for all proceedings, except family and criminal. However, even in Ontario, much civil litigation is, in fact, conducted on an unofficial contingent-fee basis, that is, a substantial fee in the event of success, only disbursements in the event of failure.¹¹

A limited form of contingency fee is permitted in Ontario under the 1992 *Class Proceedings Act*,¹² which allows lawyers acting on behalf of plaintiffs in class actions to enter into written agreements with their clients for payment only in the event of success. These arrangements must be approved by the court. This arrangement is similar to the English system, as successful lawyers do not receive a percentage of the award, but instead receive their fees, which are increased by a set multiplier.

However, one barrier to class proceedings providing legal services to low-income earners is found in the Ontario two-way-costs rule. Under that rule, the losing party must pay a substantial part of the winner's legal bills. While a contingency fee means that the client does not have to pay his or her lawyer in the event of a loss, it does not remove the obligation to pay the other side's costs.

⁹ R.S.O. 1990, c. S.15, s. 28.

¹⁰ R.S.O. 1897, c. 327.

¹¹ M. Trebilcock, "The Case for Contingent Fees: The Ontario Legal Profession Rethinks its Position" (1989), 15 C.B.L.J. 360.

¹² R.S.O. 1992, c. 6, s. 33.

To address the disincentives posed by the risks of burdensome costs being imposed upon a losing class-action representative plaintiff, Ontario established the Class Proceedings Fund. This fund provides financial assistance to plaintiffs who lose a class action and must pay the other side's costs. The Class Proceedings Committee approves applications based on such criteria such as public interest in the lawsuit. The scheme is intended to be self-funding, and it requires a successful plaintiff to pay back a percentage of his or her award into the fund.

Proponents of contingency fees argue that they enhance access to justice for certain groups, especially the working poor, who could not initiate litigation under an hourly-fee contract.

A recent empirical study comparing Ontario and British Columbian litigation experience by Professor Jacob Ziegel and Douglas Cumming, indicated that "lawyers are more willing to act for cost-averse or impecunious clients where contingency fees are explicitly permitted in the jurisdiction in which they are practising".¹³ They concluded that, as a result, it is likely that percentage contingency fee arrangements increase access to justice through private solicitors. Also they found that percentage contingency-fees generally reduced the minimum dollar value of the claims at which lawyers will take on clients.

While some critics of contingency-fee arrangements are concerned that contingent arrangements would encourage litigation, the Canadian "party and party" costs rule imposing the costs of the victorious party on the losing party is a deterrent to such frivolous cases. Moreover, lawyers are not likely to expend their efforts on unmeritorious actions when their fee is contingent upon success.

Further concern about contingent arrangements may arise in relation to situations where lawyers fail to disclose that the case is an easy win, requiring very limited legal services, or that it may be easily settled. In these circumstances, they can earn a large contingency fee for very little risk or effort. Safeguards should be put in place to reduce such occurrences.

(b) CONTINGENCY LEGAL AID FUNDS (CLAF) AND MODIFIED CONTINGENCY LITIGATION ASSISTANCE

It is clear that the expense of litigation is one of the fundamental barriers to access to justice. The creation of a Contingency Legal Aid Fund (CLAF) is one way of enhancing legal assistance to low-income earners who would otherwise be deterred from litigation by the costs involved. It provides a means of supporting the legal costs of those with limited resources. It also could be an alternative to instituting province-wide contingency-fee arrangements. A CLAF could be set up under a scheme that is similar to the Class Proceedings Fund (described above).

The operation of a CLAF is quite straightforward. Litigants whose cases are accepted into the scheme and who have met the financial-eligibility criteria would have their legal costs, including the other side's lawyer fees if they lose their case, paid by the fund, but must agree to pay into the fund a proportion of damages recovered if they win. The administrators of the scheme would assess the merits of a case at the outset in a manner

¹³ J. Ziegel, and D. Cumming, "An Empirical Perspective on the Interplay Between Contingency Fees and the Legal System" (Toronto: University of Toronto, February 1997) [unpublished] at 13.

similar to the assessment of cases under the current legal aid system. If they decide that the case has a reasonable likelihood of success, the litigant's claim would be accepted into the scheme.

The creation of a CLAF improves access to legal representation in a small number of civil matters involving money claims, such as wrongful dismissal, personal injury, consumer and commercial litigation, real estate, and estate matters. Essentially, a CLAF is designed to avoid the need for litigants to pay their legal costs up front. Following the initial infusion of start-up capital, the surcharges imposed on damages recovered by successful litigants enable the system to operate on a self-funding basis.

CLAF schemes have been implemented in Hong Kong and various Australian states. The Supplementary Legal Aid Scheme (SLAS), as it is called in Hong Kong, has been in place since 1984. Applicants must pass a merits test which assesses the reasonableness of the claim, and a means test, which examines whether the applicant's financial situation meets eligibility criteria.¹⁴ If a claim is settled before trial, the successful plaintiff must pay 7.5 percent into the fund, and if the plaintiff wins at trial, 15 percent is paid to the fund.¹⁵ The SLAS covers monetary claims which have a good chance of success. It extends to personal injury cases; employee compensation claims; and medical, dental, and professional negligence claims.

In Australia, the states of Victoria, Western Australia, and South Australia make use of contingency-style litigation funds. In Victoria, the Attorney General granted money to a program which will launch the Law Aid Scheme, a contingency-funding arrangement, to be administered by the Law Institute and the bar. The Law Society in Western Australia currently operates a modified contingency litigation assistance fund, referred to as WALAF. A client who cannot afford to litigate a case approaches a lawyer, who applies to the fund, which underwrites the risk of an adverse-costs award. The successful plaintiff must remit 15 percent of the damages award to the fund. The successful lawyer works for a flat fee prenegotiated with the Legal Aid Board. This fee is usually slightly below market rates for the same legal service. Since 1991, the Southern Australian Law Society has operated a contingency-like Litigation Assistance Fund (SALAF), resembling that of Western Australia. By 1992, there were fewer applicants than expected: only 139, of whom 29 received funding. Barriers to the fund include the fixed legal fee for which the applying lawyers work, and a \$1,000 application fee.

There are numerous ways to set up a CLAF or a modified contingency litigation assistance scheme, and various safeguards that can be put into place to avoid frivolous and protracted cases. First, a fairly stringent merits test is needed, and, second, a case-management scheme administered by the CLAF staff is required. With these two conditions in place, only cases with a reasonable prospect of success will proceed.

For a CLAF or other assistance scheme to be economically viable, a sufficient number of people with strong cases must apply to the scheme. One risk is that the majority of the people with strong cases will find lawyers who will take the cases outside the scheme, with

¹⁴ A. Lindley, "Contingency Legal Aid Revisited", *Consumer Policy Review* (November/December 1995) at 208.

¹⁵ *Ibid.*

the result that only those with borderline cases who do not want to risk paying high costs will be using the scheme. However, with an effective merits test in place, this is less likely to occur. Moreover, the availability of financial assistance in relation to disbursements will also assist in attracting meritorious claims.

(c) PAYMENT OF DISBURSEMENTS ONLY

An increasing amount of public-interest litigation is being undertaken by established law firms, with only disbursements being paid by the client or by legal aid. In novel or speculative cases, it is often the expense of expert reports and disbursements associated with non-legal matters which adds substantially to the costs of litigating the issues. Although lawyers absorb the costs associated with their own time spent on the case, they often act out of a sense of personal or professional obligation to “give something back to the community”, and may occasionally benefit from the publicity and valuable legal experience of litigating precedent-setting cases.

(d) LEND-AN-ASSOCIATE PROGRAM

Law firms could be encouraged to “lend” associates on a rotating basis for defined periods of time to the various organizations involved in the delivery of legal aid services. In some cities in the United States, such as Chicago, large law firms have lent associates to legal services programs for periods of up to six months while continuing to pay the associates’ salaries and benefits.¹⁶ The firm gains from the associates receiving valuable training and experience in the areas of client contact, client counselling, and courtroom performance. The legal aid authority benefits from both the donated legal work and the likelihood that the associates will maintain an ongoing volunteer connection with the program after their return to private practice. However, controls must be put in place to avoid a negative impact on the clients due to lack of continuity in service provider and lack of expertise in the relevant subject-matter.

Public-interest cases could also be an opportunity for law schools to form mutually beneficial relationships with large law firms by providing legal research support. In return, the students would receive valuable litigation training.

(e) STUDENT AND SUPERVISED PARALEGAL INVOLVEMENT

Some of the U.S. state bars encourage law schools to maximize opportunities for law student participation in *pro bono* work by instituting mandatory *pro bono* work, requiring such service as a condition of graduation. At least ten schools nation-wide have done this.¹⁷ The mandatory obligation ranges from twenty to seventy hours annually, depending on the school. Whether the program is voluntary or mandatory, resources have to be committed to ensure appropriate case placement, supervision, and student evaluation.

Some civil law matters may be appropriately serviced by the support of supervised paralegals or students at the courthouse or administrative agency. For example, Professor Iain Ramsay, in the Ontario Law Reform Commission’s *Rethinking Civil Justice: Research*

¹⁶ California, State Bar, *And Justice for All: Fulfilling the Promise of Access to Civil Justice in California* (San Francisco, Ca.: Access to Justice Working Group, 1996) at 65.

¹⁷ *Ibid.*

Studies for the Civil Justice Review, suggested that earlier experiments with the use of duty counsel in small claims court should be extended. This could be a valuable experience for a student lawyer or an articling student. It would be particularly useful in urban courts which have significant levels of debt cases.¹⁸ He also argued that there should be greater opportunities for paralegals, law students, and clerks to provide legal advice in Small Claims Court. In Quebec, there is a paralegal advice service available in the court.¹⁹

(f) ASSISTED UNREPRESENTED AND PARTIALLY REPRESENTED LITIGANTS

As the number of unrepresented litigants in court increases dramatically, concern is growing about their inability to represent themselves. The overburdened justice system can and should take steps to assist these people in representing themselves more effectively. The following are some strategies which would allow at least some assistance to be provided to litigants who otherwise would be completely unrepresented, until other more substantial efforts to promote access to justice for the working poor are realized.

(i) Expanded Use of Coaching

In California, an increasing number of legal services providers have begun to offer coaching to their disadvantaged clients as a low-cost substitute for full-scale representation. Legal services offices provide a lawyer who coaches a group of clients on how to represent themselves during a court proceeding or an administrative hearing. The clients, who are facing similar legal issues, such as eviction, attend a forum where applicable laws, court procedures, and legal forms are reviewed. After this session, the clients are on their own to represent their interests.²⁰

Coaching assistance can be effective in simple, uncontested cases. Although it would be preferable to have legal counsel, there are situations where self-assisted litigants can be successful if they are well informed. Unfortunately, when the opposing side has counsel, it will still be extremely challenging for the party appearing unrepresented to achieve a satisfactory outcome.

(ii) Expanded Use of Peer Counselling

The use of peer counselling has long been practised by Ontario's legal clinics in selected cases and carefully controlled circumstances as a means of stretching the resources for "poverty law" needs. In litigation, an organized teaching program for the client group is possible. This may be supplemented by a distribution of tasks among the group (filing, serving, research, planning, speaking roles), with a resource person remaining available for advice during the course of the proceedings.

(iii) Expanded Use of Unbundled Legal Services

Lawyers and clients now, more than in the past, often agree to divide responsibility for various legal preparation tasks needed to further the client's case. This has been formalized

¹⁸ I. Ramsay, "Small Claims Courts: A Review" (1996), in *Rethinking Civil Justice on Civil Justice: Research Studies for the Civil Justice Review*, Ontario Law Reform Commission, Vol. 2, 491 at 541.

¹⁹ *Ibid.*

²⁰ *Supra*, note 16, at 34.

by some lawyers and clinics in Ontario. For example, some lawyers will agree that, if the client files and serves documents, the fee is reduced. Packages or kits designed by lawyers to assist lawyers providing “unbundled” legal services are available for purchase. Clients who have some degree of legal knowledge or related experience can also undertake factual research.

The more difficult and time-consuming the client tasks are, however, the greater the risk that clients’ interests could be compromised. Ethical questions regarding the adequacy of support by the lawyer in cases of varying complexity readily arise.

(g) PREPAID LEGAL SERVICES

Prepaid legal services plans involve the advance payment of fees or premiums in return for future legal services. They can be purchased by individuals from commercial providers, established by groups, or provided by an employer as an employment benefit.

Coverage provided by prepaid legal services plans varies widely, but tends to focus on summary legal advice, wills and estate administration, and home purchases and sales. More comprehensive plans may include coverage for family matters, representation in court or tribunals (but generally not major litigation), personal injury, consumer and debt matters, and, to a very limited extent, criminal matters. Many of the areas of law covered by prepaid services plans are not traditionally the areas of law which are identified by legal aid plans as a priority for clients.

The concept of prepaid legal services has not been widely implemented in Ontario and the rest of Canada, despite a reasonable degree of penetration in the United States. In the 1970s and 1980s, prepaid legal services plans were regarded as a potential means of enhancing access to the justice system for middle- and lower-income earners. The primary obstacles to the use of prepaid legal services plans have been low public and union demand, uncertain treatment by insurance regulators, unfavourable taxation status, and, at one time, opposition by the legal profession.

Despite the above-mentioned reservations, a few prepaid legal services plans have been offered by employers in Ontario. The largest plan is operated by the Canadian Auto Workers and was set up in 1985. It covers approximately 200,000 people across Canada, including CAW members, their spouses, and their dependants. There are a handful of other smaller union/employer plans. Entrepreneurs and insurance companies have entered the prepaid-legal-services market with limited success, but the general public remains largely unfamiliar with the concept.

Prepaid plans offer limited scope for enhancing access to legal services for the low-income earner because potential legal clients rarely have the funds to buy individual plans and are not likely to be covered by an employment plan. However, once legal aid is structured as we envisage, there may be the potential for the legal aid authority to work with prepaid-legal-plan providers to improve access to a limited range of legal services either through public legal education about available schemes or by actually participating in service delivery under a prepaid plan.

3. RECOMMENDATIONS

1. The Ontario government should introduce legislation that allows for regulated contingent-fee arrangements for lawyers in Ontario.
2. The legal aid authority should coordinate efforts with its justice-system partners to establish a Contingency Legal Aid Fund for low-income Ontarians.
3. The legal aid authority should revisit the range of civil cases that historically had coverage under the Plan, and should reassess whether or not coverage should be provided to people in some or all of the matters in light of our articulated priority-setting considerations and managed-intake proposals.

FUNDING AND FINANCIAL ARRANGEMENTS

1. CONTEXT

Chapters 8 through 13 of this report discussed the means by which specific legal aid services can be delivered on a fixed budget. This chapter considers some of the funding, financial, and administrative arrangements appropriate to a fixed budget. Although this subject is often considered technical, the policy issues considered in this chapter have important consequences for the system's ability to deliver integrated, cost-effective, high-quality services.

2. MAJOR ISSUES

In this section, we discuss several policy issues which we believe are relevant to the funding and financial administration of legal aid services in Ontario. These issues are:

- (1) legislative reform;
- (2) multiyear funding allocations;
- (3) budget structure;
- (4) management information/information technology;
- (5) client contributions, cost recovery, debt collection;
- (6) federal contributions to legal aid services in Ontario; and
- (7) provincial funding in the post-Memorandum of Understanding (MOU) period and transitional funding.

(a) Legislative Reform

As noted in chapter 3, the *Legal Aid Act* and the “Clinic Funding Regulation” establish separate funding structures for the certificate and clinic programs. The *Legal Aid Act* establishes the basic funding structure for the certificate program under which funding has until recently been demand-driven and financially “open-ended”. The Act states that the Plan is to issue certificates if applicants meet qualifying criteria. It may also require the provincial government to fund any resulting deficits. This latter requirement flows from section 96 of the general *Legal Aid Act* Regulation, which reads:

Where a sufficient amount was not provided in the approved estimates and the public interest or the urgent requirements of the Fund necessitate further payments, the Attorney General, upon the report of the Director as to the necessity of further payments and stating the reasons that the appropriation is insufficient and the amount estimated to be required, shall make application to

the Management Board of Cabinet ... for an order authorizing payments to be made against such amount as the Director considers appropriate.¹

Funding for the community clinic program is established and governed by the terms of the *Legal Aid Act*'s "Clinic Funding Regulation". While the clinic funding budget is part of the overall legal aid budget, the "Clinic Funding Regulation" specifies that clinic funds are to remain separate from those allocated to other legal aid services by requiring that "the money required for the purposes of this Part [the "Clinic Funding Regulation"] shall be paid out of the money designated by the Attorney General for the purposes of this Part".² Clinic supporters consider the separate funding formula for the clinic budget an important bulwark against potential "raiding" of the clinic budget in order to fund the certificate program.

Unlike that for the certificate program, funding for the clinic program is not "open-ended". These funds are designated one fiscal year at a time. As a result, both individual clinics and the clinic system as a whole must run on fixed, annual budgets. The Regulation makes no provision for any shortfall in funds; clinic services must be tailored each year to the available funding.

As noted in chapter 1, our Terms of Reference explicitly state that the legal aid system will continue to have a fixed, not open-ended, budget from the provincial government. Accordingly, we are assuming that the provincial government intends to entrench fixed funding for legal aid services. Our goal, therefore, is to recommend the legislative and operational structures appropriate to a fixed budget.

In this light, we recommend that the legislation itself must be amended. Neither the MOU nor any other administrative agreement can address the "gap" between the funding structure set out in the *Legal Aid Act*—open-ended funding—and the current and proposed reality—fixed-funding. At the very least, it is inappropriate and misleading if the *Legal Aid Act*'s legislative and regulatory provisions do not coincide with the practical realities of legal aid funding.

Given the government's desire for a fixed budget, and the Plan's need for recognition of the two- and three-year funding cycles of many legal proceedings, we recommend that the provincial government amend the *Legal Aid Act* to fund the legal aid authority within rolling, three-year cycles. This amendment would explicitly acknowledge the legal aid system's new funding structure. The details of this proposal are discussed below.

(b) Multiyear Funding Allocations

In chapter 8, we recommended that the provincial government commit itself to providing ongoing, secure, multiyear funding for legal aid services in Ontario. We believe that this commitment will reconcile the provincial government's desire to establish predictable, fixed funding allocations for legal aid with the fact that the funding of legal aid cases often extends over three or more fiscal years. Multiyear funding is also necessary because the legal aid authority will require a certain lead time to respond to the changing patterns and levels of need.

¹ O. Reg. 710, s. 96.

² *Ibid.*, s. 15.

In our view, such a commitment is of central importance to the operations and administration of a reformed legal aid program. A multiyear funding commitment by the provincial government in the future would allow the administrators of a reformed legal aid plan to avoid the planning and operational crises which often attend sudden, unpredictable changes in funding or need. A rolling, three-year funding allocation would be appropriate under the circumstances.

In this system, the government would commit to three-year funding levels in each annual government budget. Thus, for example, the provincial budget for 1998/99 would establish the legal aid transfer payment for that fiscal year, and for 1999/2000 and 2001/02. The budget for 1999/2000 would confirm the amount for that year and 2001/02 (the Act might permit a variance in exceptional circumstances), and establish the level for 2002/03. This would allow the legal aid authority to plan its affairs in light of the funding the government was able to provide, and would work well with government fiscal framework planning, which generally predicts funding levels at least that far in advance for programs like legal aid. The government's public commitment to three years of funding would simply reflect the practical reality that it takes that much time to "turn the ship".

The Act should provide for the funding cycle, and should allow the legal aid authority to transfer surpluses or deficits between fiscal years within it. The authority should be required to balance its budget by the end of each three-year cycle, unless the Attorney General authorized the carry-over of a surplus or deficit to the next cycle. This flexibility is important if we are to expect the legal aid authority to manage its operation rather than just to authorize service and pay bills.

We emphasize that we believe that the province's commitment to provide multiyear funding must be matched by a concurrent commitment of the legal aid authority to manage these funds in the most cost-effective and transparent means possible. At the very least, the legal aid authority must provide the provincial government with annual reports, annual business plans, and a multiyear strategic plan so that the province may evaluate the legal aid authority's budget requests.

(c) Budget Structure

We must also address the question of whether there should continue to be separate budgets for the clinic program and other legal aid services. The separation of the clinic and certificate program budgets was intentional. The authors of the original "Clinic Funding Regulation" feared that "pooling" these budgets would tempt the Law Society to divert clinic resources to the certificate program. This concern was founded on a belief that the Law Society's commitment to private-bar delivery of legal aid would always take precedence over its commitment to clinics, especially during times of fiscal restraint. According to this view, the formal separation of the two budgets is absolutely critical to the continued survival of the clinics.

Given the high priority we have placed on "poverty law" services, we have no intention of suggesting reforms which would either explicitly or implicitly threaten clinic funding. That said, we believe that it will be both desirable and necessary to integrate these two budgets once those services begin to function as part of a coordinated legal aid system.

In view of the substantial changes we have recommended to non-clinic program areas, we believe that clinic funding should be secured for as long as may be necessary to

transform the operation of the rest of the system. In our view, it would unwise to integrate the two budgets until such time as the fundamental changes we have proposed for the delivery of criminal law, family law, and other legal aid services have taken effect. Secure funding for the clinic program during this period will ensure that the basic underpinnings of this program will remain in the face of more significant changes in other program areas. These changes are likely to fully occupy the legal aid authority's time in the first few years of its operation. Moreover, we believe it would be unwise to alter the clinic system until the fundamental structure and operations of the rest of the system are apparent.

Once those changes are complete, the budgets for all legal aid programs should be integrated. At that point, the governors of the legal aid authority should be able to establish comprehensive service priorities, evaluate alternative program-delivery models on the basis of actual experience, and allocate funds to specific program areas.

While it is difficult to predict the length of this transition period, we believe that the *Legal Aid Act* should, at a minimum, preserve at least the current level of funding for the clinic program through the first post-MOU three-year funding cycle. We stress that this specific recommendation is being made within the context of our general recommendation for a legislated three-year funding allocation for legal aid services generally. Moreover, given the relatively small portion of the current legal aid budget devoted to clinics, and the important role we believe they will assume within the new system, we are confident that this condition will not unduly restrict the authority or operations of a new legal aid authority.

(d) Management Information/Information Technology

One of the consequences of the certificate program's funding crisis in the period immediately following the adoption of the MOU was a critical evaluation of the Plan's management information and information technology. Although a "Strategic Plan for Information Technology" had been prepared for the Plan in 1992, little progress had been made on its major recommendations. The purpose of this strategic plan was to "create a comprehensive information technology environment to meet the challenges of [the Plan's] future business environment".³

As a result of the crisis, the Law Society and the Plan's management began to improve its management information and information technology. In particular, the Plan's Service Encounter System, which is designed to improve the Plan's legal aid application and certificate management, is now implemented in almost every Area Office.

Despite these advances, many observers believe that the Plan's information systems and management information could still be improved. For example, the "Strategic Plan for Information Technology" recommended several improvements to the Plan's payment-agreement management and legal-accounts management, which have yet to be implemented.

We do not intend to make specific recommendations about the appropriate technology or management information needed in present or future circumstances. Rather, we stress two broader points.

³

DMR Group Inc., *Strategic Plan for Information Technology* (unpublished report prepared for the Ontario Legal Aid Plan, March 1992) at 1.

First, we strongly believe that the governors and senior management of a legal aid program in Ontario require sophisticated management information and information technology. The relationship between management information and information technology and the legal aid system's ability to fulfill its broad mandate cannot be overemphasized. In order to plan for and work within the three-year budget cycle we have proposed, the legal aid authority will have to be much better informed than it has been in the past. Policy choices on subjects as diverse as priority-setting, cost-effectiveness of alternative service providers, quality-assurance mechanisms, financial planning, and the preparation of budgets depend on the legal aid system's ability to collect and analyze sophisticated data. Equally important, the governors of the legal aid system will be unable to meet their obligation to provide reliable cost projections (and multiyear budget requests) if they lack the data necessary to estimate the value and timing of these liabilities.

Second, the specific management information and information technology required in a fixed-budget environment necessarily depend on the choices that the governors of the legal aid program make regarding delivery models, quality-assurance mechanisms, and number and location of offices. The information technology necessary to collect and analyze management information from a Staff Office differ significantly from that used to the same ends for a judicare service provider. At a general level, however, we believe that improved management information and information technology can be used to increase operational and financial controls, reduce administrative costs, enhance program-evaluation capabilities, and improve the quality of service to clients and service providers, potentially including improvements in access, electronic reporting of work done, direct deposit to service providers' bank accounts, electronic reporting of payments for work done, and monitoring outstanding work-in-progress and work yet to be done.

In view of these considerations, we recommend that the governors of the legal aid program make the development of a sophisticated management-information and information-technology strategy an early priority.

(e) Client Contributions, Cost Recovery, Debt Collection

Client contributions, cost recovery, and debt collection have been an important source of revenues for the Plan. In the past, the Plan has collected considerable sums from these sources. As noted in chapter 2, the Plan's financial-eligibility rules require clients to contribute towards the cost of their legally aided services if they have funds available after meeting their basic expenses, or if they own a house. In fiscal year 1995/96, clients contributed \$17.0 million towards the cost of the Plan programs, including \$12.7 million collected from liens on client property. In the same year, \$4.8 million was paid to the Plan as a result of client recoveries in civil matters.⁴

We are doubtful that client contributions are a likely source of substantial new revenues for legal aid services. Revenues generated from client contributions are necessarily linked to the number of certificates issued and the number of Pay Agreements signed with successful applicants. In the past three years, the number of certificates has declined significantly. As a result, there are substantially fewer clients from whom to request contributions. At the

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Law Society of Upper Canada, *Ontario Legal Aid Plan Report 1995* (Toronto: Law Society Upper Canada, February 1, 1996) at 10.

same time, the financial-eligibility threshold has been cut considerably, meaning that those clients who do qualify for legal aid are likely to have less money with which to make a contribution.

Nonetheless, the record of client contributions is impressive. We believe that it is appropriate to continue the client-contribution policy. In our view, it is only fair to ask those clients who are able to contribute a portion of the cost of their legal aid services to do so. Moreover, a continuation of this policy would allow the legal aid authority to expand its financial-eligibility standards in better economic times.

Finally, we note that we are doubtful that the Plan's accounts receivable represent a significant source of potential revenues. These accounts are primarily in the form of unrealized liens, outstanding Pay Agreements, and judgment debts. Plan liens often have less priority than other creditors. As a result, many liens are essentially uncollectable. Nor does the Plan have the power to force homeowners to sell their property in order to make payments on their Plan accounts. So, too, the collection of outstanding Pay Agreements is frustrated by the fact that the income level of most legal aid clients makes it unlikely that many debts can be recovered. Notwithstanding these doubts, we believe that the collection of these moneys should be improved, if it proves cost-effective to do so.

(f) Federal Contributions to Legal Aid Services in Ontario

The federal government funds legal aid through the various cost-sharing agreements, as discussed in chapter 3. In recent years, the federal government has either reduced or "capped" funding available for legal aid in Ontario.

The question of the appropriate amount of federal funding for legal aid services in Ontario is a matter of continuing controversy between the two governments. Most obviously, federal legislation in the areas of refugee, criminal, and young offender law has often substantially increased the demand for legal aid services without a corresponding increase in the federal contribution to legal aid services in Ontario. For example, section 11 of the *Young Offenders Act* requires the province to provide free legal aid to all young offenders, regardless of their circumstances. Less obviously, the federal government has also passed legislation in the fields of criminal, family, and income-support law which has affected the demand for legal aid services.

We believe that the legal aid authority and the provincial government should approach the federal government on a number of issues:

First, the legal aid authority and the provincial government should urge the federal government to maintain or increase the present level of federal funding.

Second, the legal aid authority and the provincial government should identify federal laws, procedures, or policies which affect the demand for legal aid in furtherance of our recommendation that the legal aid authority "undertake ongoing research and develop strategies to implement law and procedures which encourage access to justice and an efficient, integrated justice system".⁵

⁵ This responsibility is outlined in ch. 8 of this report.

Finally, we believe that the legal aid authority and the provincial government should approach the federal government and seek funding for one or more of the innovative projects we have discussed in this report. We note that the federal government has funded many legal aid pilot projects and research studies in Ontario and other provinces in the past.

(g) Provincial Funding in the Post-MOU Period and Transitional Funding

The quantum of funds available for legal aid services in the post-MOU period is a complex question. If we assume: (1) that the prevailing level of funding is maintained; (2) that the overhanging loans that were created in prior years to meet cash-flow deficiencies have been retired; and (3) that the number of certificates issued and their cost remains roughly the same as in current projections, there could be more funds available for legal aid services in the period immediately following the expiry of the MOU.

Under the circumstances, we do not believe that the provincial government should reduce funding for legal aid services. Throughout this report we have repeatedly emphasized the presence of vast unmet legal needs all across Ontario. As a result, we strongly recommend that the prevailing level of funding for legal aid services in Ontario continue past the expiry of the MOU. A provincial commitment to prevailing funding would go a long way towards ensuring that the legal aid system would be able to fund the many reforms and service enhancements we believe are necessary.

In the interim, we recommend that the provincial government establish a separate budget allocation for the purpose of funding one-time "transition" costs, including the appointment of a transitional board, and improving information technology. These moneys are necessary to ensure a smooth transition from the current system to the next one, and to ensure that it will be fully operative (rather than a developmental stage) upon the expiry of the MOU. These funds will be required in the 1998/99 fiscal year. The details of our transition strategy are discussed chapter 16.

3. RECOMMENDATIONS

1. Assuming that the legal aid system in Ontario is to meet fixed funding commitments, the *Legal Aid Act* should be amended to reflect this arrangement.
2. The provincial government should provide the legal aid authority with a rolling, three-year funding allocation. The legal aid authority should be allowed to carry surpluses and deficits within the three-year cycle (and, with the Attorney General's approval, between cycles).
3. As a condition of funding, the legal aid authority should provide the provincial government with annual reports, annual business plans, and a multiyear strategic plan.
4. The *Legal Aid Act* should, at a minimum, guarantee the current level of funding for the clinic program's current mandate for a period of at least three years after the expiry of the MOU.

5. The legal aid authority should make the development of a sophisticated management-information and information-technology strategy an early priority. This strategy should seek to:
 - (i) increase operational and financial controls;
 - (ii) reduce administrative costs;
 - (iii) enhance program-evaluation capabilities; and
 - (iv) improve the quality of service to clients and service providers, potentially including improvements in access, electronic reporting of work done, direct deposit to service providers' bank accounts, electronic reporting of payments for work done, and outstanding work-in-progress and work yet to be done.
6. The legal aid authority should continue its client-contribution policy based on assessed ability to pay.
7. The legal aid authority should improve its ability to recover client contributions and costs, including improved collection on Pay Agreements and lien proceeds, should it prove cost-effective to do so.
8. The legal aid authority and the provincial government should approach the federal government in order to:
 - (i) urge the federal government to maintain or increase the present level of federal funding to legal aid;
 - (ii) identify federal laws, procedures, or policies which affect the demand for legal aid and access to justice in furtherance of the authority's responsibility to undertake ongoing research and develop strategies to implement law and procedures which encourage access to justice and an efficient, integrated justice system; and
 - (iii) seek funding for one or more of the innovative projects discussed in this report.
9. The prevailing level of funding for legal aid services in Ontario should continue past the expiry of the MOU.
10. The provincial government should establish a separate budget allocation for the purpose of funding one-time "transition" costs, including the appointment of a transitional board, and improved information technology, which funds will be required in the 1998/99 fiscal year.

GOVERNANCE

In this chapter we consider a number of issues pertaining to the governance of legal aid in Ontario. In chapter 3 we described the governance scheme currently in place. It will be recalled that the *Legal Aid Act* confers upon the Law Society the authority to "establish and administer a legal aid plan". This responsibility is divided, at the present time, between two Law Society committees, the Legal Aid Committee and the Clinic Funding Committee.

The Legal Aid Committee currently oversees the certificate system and duty counsel services. This Committee currently has eight members, seven of whom are Benchers (elected members of the governing body of the Law Society). The size of the committee was reduced by the Law Society in July, 1996 in order to provide a more "focused stewardship" during the fiscal crisis. Since 1989, the committee had been comprised of fifteen members and one student. Ten of the members were lawyers, five of whom were Benchers. The other five were lay members appointed by the government of Ontario. The reduction eliminated the non-Bencher lawyers and four of the five lay members of the Committee.

The Clinic Funding Committee is composed of five members, including two non-lawyers. Three members are appointed by the Law Society and two by the Attorney General. This committee is responsible for establishing policy and guidelines for funding clinics and for administering the clinic funding program. At the level of individual clinics, important questions of operational policy, including the determination of case priorities, is determined by a local, volunteer board of directors.

The most fundamental issue we must address is whether the Law Society should continue to have responsibility for the governance of legal aid in Ontario. If not the Law Society, then a number of further questions arise. What sort of body or agency should be established, presumably by statute, to assume this responsibility? What should be the relationship of a new body to the government of Ontario, on the one hand, and to the legal profession on the other? What should the composition of the board of a new agency be, and how should it be selected? How should the relationship between the new body and the clinic system be structured? What institutional arrangements should be put into place to secure independence of the agency from government with respect to the provision of legal services and, at the same time, accountability to government with respect to its expenditure of public funds.

We begin our analysis of the central issue—what body should govern legal aid in Ontario—by attempting to identify the goals and objectives of a legal aid governance scheme. The objectives of governance suggest, in turn, the attributes of an ideal governance scheme against which one may measure the appropriateness of existing arrangements in Ontario or

alternatives that may be proposed. We then turn to a brief discussion of experience in other jurisdictions in Canada and abroad before returning to the central issue.

1. THE GOALS AND OBJECTIVES OF GOVERNANCE

At the most abstract level, the goal of institutional governance is to exercise control over an institution in order to achieve institutional objectives. The instruments of governance set directions for the institution, make policy decisions on matters of importance, monitor progress towards institutional objectives and are held accountable for institutional success or failure. While these broad propositions are as true in the context of the governance of legal aid as they are in other contexts, our concern is to identify the special characteristics of legal aid that lead to more precise goals and objectives for its governance. More particularly, our terms of reference require us to consider how the governance of legal aid can best be accomplished in a world in which its funding is subject to a budgetary limit or cap. As will be seen, our thinking about the implications of capped funding for governance issues flows from the new vision for legal aid which we have outlined in Chapter 8.

(a) INDEPENDENCE

The legal aid scheme in Ontario is publicly funded and its most important source of funding is the government of Ontario. Nonetheless, it is of vital importance that the legal aid scheme be, and be seen to be, independent of the government of Ontario. The provincial government is typically the opposing party in a legal aid case, whether as the prosecutor of a criminal offence or as the party in opposition in the types of "poverty law" cases which involve persons in need of legally aided services. In some kinds of family law cases, the government is the opposing party; in others, it is present as an interested party. It would obviously undermine the objective of securing access to justice if the government itself were to be involved in determining the nature and quality of the services being provided to its adversaries in particular cases. As we have indicated, it is our view that the government must commit itself to the independence of the legal aid system with respect to policy-making and decision-making on issues of this kind. The governance structure should reflect that commitment.

A more contentious issue, however, is whether the governance of the legal aid system needs to be, or needs to be seen to be, independent from the legal profession and, if so, whether such independence is secured under current institutional arrangements. We return to these questions below.

(b) ACCOUNTABILITY FOR EFFICIENT USE OF PUBLIC FUNDS

The legal aid system must also be accountable to the government of Ontario and to the general public for its handling of public funds. At the present level of funding, in excess of \$200 million of public moneys is being spent on legal aid in the province. The governance structure must be able to reassure the public that the money is being wisely spent. The governors of legal aid must be able and willing to provide the kinds of reports and information that will permit the government and other interested parties to reach informed conclusions about the manner in which public resources have been expended upon legal aid. More particularly, the governance structure should be capable of ensuring that the efficiency of service delivery is enhanced by effective use of well-designed information technology and modern management techniques.

(c) OBTAINING ADEQUATE RESOURCES FOR LEGAL AID

If the legal aid system is to function properly, it must be adequately funded. It is for the government of the day, of course, to determine the trade-offs that must be made between the funding of legal aid and the funding of other important public services and activities. Within that context, however, it is important that the governor of the legal aid system be a credible and effective advocate for the fiscal needs of the legal aid system. The structure of the governance system will have an impact on its effectiveness in this regard.

(d) ABILITY TO DELIVER QUALITY SERVICES IN A BROAD RANGE OF AREAS OF THE LAW

We have indicated that we favour continuation of the current broad mandate of the legal aid system to provide coverage across a broad range of areas of the law that have a significant impact on the lives of potential recipients of legal aid. The governance structure must have the capacity to supervise adequately policy development, planning, and service delivery across the spectrum of services provided on legal aid.

(e) CAPACITY TO PROMOTE CONFIDENCE IN THE LEGAL AID SYSTEM

It is important to the success of a legal aid system that various constituencies who have a stake in the operation of legal aid are confident that the system is being effectively and fairly administered. The system must enjoy such confidence from members of the legal profession whose services and cooperation are of vital importance to its capacity to function. The system must similarly enjoy the confidence of governments which are required to provide funding. As well, of course, the system must enjoy the confidence of the clients it serves and the public more generally. An important feature of the design of a governance system, then, must be that its nature is such as to enhance the ability of the system to enjoy the confidence and support of these various constituencies.

(f) RESPONSIVENESS TO CLIENT NEEDS

We have earlier suggested that the policy development and planning functions of the legal aid system should be animated by a responsiveness to client needs. The services delivered by the legal aid system should be linked to the great variety of individual and community needs of those it serves. The governance structure, therefore, should be one which ensures that procedures are in place to assess actual client needs, and that a true understanding of those needs will inform deliberations at the governance level.

(g) EFFICIENT GOVERNANCE

Ideally, the governance structure should increase the likelihood that the system will be administered in an efficient and competent manner. Administrative success will require governors who can effectively inspire quality and commitment and, as necessary, control wrongdoing, negligent conduct and inefficient operation. It will require governors who have intimate familiarity with the complexity of the legal system and the practice of law in Ontario. It will require governors who understand the realities of poverty and are familiar with the legal needs of low income Ontarians. It will require governors who can bring to bear modern management skills. It will require governors who can deal effectively with broad policy questions. The governance structure of legal aid must be such as to attract all of these sorts of talents and expertise to the table.

(h) COORDINATED MANAGEMENT OF THE ENTIRE LEGAL AID SYSTEM

Ideally, the legal aid system should function as a system in the sense that the resources of each of its parts are directed, in a coordinated fashion, towards the achievement of broad institutional objectives. More particularly, our consultations across the province lead us to believe that greater coordination needs to be achieved between the clinic system and the provision of services through the certificate program. The objective should be to create a “seamless” service able to focus on the greatest needs of the clientele as a whole while respecting the distinctiveness of its parts. It is our view that the ideal structure for the governance of legal aid would be able to manage the entire system in a coordinated fashion.

(i) INNOVATION AND EXPERIMENTATION

As a general matter, it appears obvious that the governance of a legal aid system ought to be open to innovation and experimentation in the delivery of legal services. An emphasis on an experimental approach appears all the more important, however, in the context of a legal aid system which has capped funding. Only through experimentation with a mix of both new and traditional delivery models can a legal aid system develop the most efficient set of delivery models and fashion necessary trade-offs between cost and coverage. Ideally, then, the governance structure must be one that is conducive to an openness to innovation and has the capacity to develop innovative strategies and monitor their success.

2. GOVERNANCE OF LEGAL AID IN OTHER JURISDICTIONS

A brief survey of governance models in place in other Canadian provinces and in jurisdictions such as England, Australia and the United States suggests a broad range of possibilities for the design of governance structures for legal aid systems. An examination of this kind also indicates that the structure adopted in Ontario—governance of legal aid by the legal profession—is an unusual arrangement. Only two other Canadian provinces—Alberta and New Brunswick—have adopted this model. Outside Canada it is difficult to find another jurisdiction which has adopted this approach. The fact that the Ontario arrangements are unusual does not, of course, demonstrate that they are unsound. However, it may reinforce the view that a reconsideration of these arrangements in the context of a more general examination of the legal aid system is both timely and appropriate.

(a) ENGLAND AND WALES

Prior to 1988, the governance of legal aid in England and Wales was distributed among the profession, the government, and the courts. Responsibility for legal aid in civil matters had originally been given to the Law Society in 1949, following the Rushcliffe Report of 1945.¹ The Law Society reported with respect to legal aid matters to the Lord Chancellor. Criminal matters were, however, handled directly by the courts and were the responsibility of a different cabinet member, the Home Secretary. Responsibility for legal aid in criminal matters was transferred to the Lord Chancellor's office in 1980, and, in the case of the higher courts, is still dealt with by the courts themselves, assisted by the Lord Chancellor's Department.

¹ Lord Chancellor's Department, *Report of the Committee on Legal Aid and Advice in England and Wales*, (London H.M.S.O., 1945 and 1962).

In 1987, the British government decided to transfer the governance of legal aid—part from criminal legal aid in the higher courts—to a new independent body, the Legal Aid Board. The Lord Chancellor's 1987 White Paper proposing the changes stated: "the Government is determined to ensure that legal aid is provided efficiently and effectively, and that it gives the best possible value for the money spent".² The change was implemented by the *Legal Aid Act 1988*³ and the new board took over responsibility for legal aid from the Law Society on April 1st, 1989. The new board was to consist of no fewer than eleven and no more than seventeen, members appointed by the Lord Chancellor. The Law Society's influence on the new board was restricted to the presence of two solicitors appointed by the Lord Chancellor after consultation with the Law Society. There were also to be at least two barristers appointed after consultation with the General Council of the bar. Beyond these requirements, however, the legislation merely specified that "in appointing persons to be members of the Board, the Lord Chancellor shall have regard to desirability of securing that the Board includes persons having expertise in or knowledge of (a) the provision of legal services; (b) the work of the courts and social conditions; and (c) management".⁴ The board's membership has generally been twelve or thirteen as the first chairman had strong views about not creating too unwieldy a body. The board membership has always included a large number of persons with a business background. Six of the original twelve appointees had such a background. Three of the current members of the Board are drawn from the plan's senior managers.

There is some evidence to suggest that the new Legal Aid Board has enjoyed success. In June 1996, in response to a fiscal crisis not unlike that endured in Ontario, the Lord Chancellor produced a White Paper, *Striking the Balance*,⁵ advocating substantial reform of the delivery systems for legal aid. The White Paper proposed a cap for the funding of legal aid and suggested a variety of measures designed to improve the efficiency of service delivery. The White Paper did not, however, suggest that reform to the governance structure of the legal aid system was necessary in order to achieve the desired result of being able "to control total spending and target priority areas".⁶ Further, a knowledgeable commentator on legal aid in England has recently observed that "the creation of the Legal Aid Board has, over all, been a tremendous success".⁷ He noted that the board overhauled the administration that it had inherited and introduced modern management techniques. The board has identified performance targets and published its results against those targets. One of the concerns expressed about the previous administration of legal aid was that it was too decentralized. The new board reduced the autonomy previously enjoyed by the fifteen areas into which the legal aid administration had been divided.

² Lord Chancellor's Department, *Legal Aid in England and Wales: A New Framework* (London, H.M.S.O., 1987) at 1.

³ 1988, c. 34.

⁴ *Ibid.*, s. 3

⁵ Lord Chancellor's Department, *Striking the Balance: The Future of Legal Aid in England and Wales* (London, H.M.S.O. 1996).

⁶ *Ibid.*, at 11.

⁷ R. Smith, *You Are Not Alone: Legal aid in England and Wales*, in F. Zemans, P. Monahan and A. Thomas (eds.), *A New Legal Aid Plan for Ontario: Background Papers* (North York, Ont.: Osgoode Hall Law School, York University Centre for Public Law and Public Policy, 1997) at 11.

(b) CANADA

As already mentioned, the two provinces whose governance structure for legal aid is similar to the Ontario's in the sense that the structure is dominated by the legal profession acting through the provincial law society are New Brunswick and Alberta. In the other provinces, the typical arrangement is to set up an independent statutory corporation to which responsibility for the administration of legal aid is assigned. For present purposes, a brief sketch of each of the provincial structures will suffice.

(i) New Brunswick

Perhaps the provincial scheme whose governance is closest to Ontario is that found in New Brunswick. The *Legal Aid Act*⁸ confers responsibility for controlling legal aid in the province upon the New Brunswick Barristers' Society. The act provides that the Society may appoint a standing committee on legal aid, to be known as the Legal Aid Committee, consisting of not fewer than five members of the Barristers' Society to advise the Provincial Director on matters of administrative policy and on matters of law, and to perform such other functions as are assigned by this Act and the regulations". As in Ontario, the Society appoints a Director, subject to the approval of the Minister of Justice. The statute also provides, like its Ontario counterpart, for the appointment by Cabinet of an advisory committee to the Minister of Justice.

(ii) Alberta

Although governance of the Alberta legal aid scheme may also be said to be dominated by the legal profession, the scheme in Alberta is rather more complicated than that in Ontario and New Brunswick. Though there is no separate legal aid legislation in Alberta, provision is made in the *Legal Profession Act*⁹ for the operation by the Law Society of Alberta of "a plan to provide legal aid to persons in need of it in civil matters or criminal matters or both" by means of an agreement entered for this purpose.

Under the act, the Benchers have the authority to make the rules respecting the operation of the plan, appoint its director, control the finances and establish the board to administer the plan. In practice, however, the plan is run by a board set up as a non-profit corporation, the Legal Aid Society, which reports to the Law Society and the Attorney General. Under a 1979 agreement entered into with the Attorney General, the Law Society has delegated the administration of the plan to the Legal Aid Society. Accordingly, the Legal Aid Society has substantially more independence from the Law Society than exists under the Ontario scheme. Nonetheless, the Legal Aid Society "acts within rules established and amended from time to time by the Benchers of the Law Society of Alberta."¹⁰ The composition of the board of the Legal Aid Society is established on the basis of an agreement between the government and the Law Society. The board is normally made up of twelve lawyers and three non-lawyers. Two

⁸ R.N.B. 1971, c. 11, s.2.

⁹ R.S.A. 1990, c. L-9.1.

¹⁰ Legal Aid Society of Alberta, *Annual Report 1985* (Edmonton, 1985) at 2.

members are named by the Law Society, two by the Attorney General, one by the government of Canada and ten are selected jointly by the Law Society and the Attorney General.

(iii) British Columbia

Prior to 1979, the responsibility for legal aid services was divided between the Legal Aid Society, which was a creature of the Law Society, and the Legal Services Commission which had been established in 1975 as a device for channelling government funds to worthwhile legal aid projects. The commission provided funds for the Legal Aid Society's judicare system, as well as fostering the development of the type of community clinics which were then being established in Ontario. The commission was governed by a board of five members, two appointed by the government, two by the Law Society and one by the provincial government after consultation with the federal government.¹¹

In 1979, the Legal Services Society was established with a view to bringing most publicly funded legal services programs under one governance umbrella.¹² The Society's board consists of fourteen directors, seven of whom are appointed by the government, seven by the Law Society after consultation with the British Columbia branch of the Canadian Bar Association. At least two of the seven persons appointed by the government and by the Law Society were required to be non-lawyers. Although this board was much larger than that of the commission, the legislation provided for an executive committee of not more than five persons.¹³ A 1992 provincially sponsored study of legal aid services, the Agg Report,¹⁴ recommended that the board be restructured to provide for greater integration of the judicare and the clinic sides of legal aid system in the province. In response, the legislation establishing the Society was amended to provide for a fifteen-member Board, with representation divided equally among government appointees, Law Society appointees, and community clinic appointees¹⁵. The latter five consist of two persons appointed by the Association of Community Law Offices, two from the Native Community Law Offices and one appointed by the other four community clinic members.

(iv) Manitoba

The statutory legal aid scheme in Manitoba, first enacted in 1971,¹⁶ is governed by a body established by that statute, the Legal Aid Services Society of Manitoba. The twelve member board of the Society is appointed by the government. Three of the twelve members must be drawn from a list of seven lawyers selected by the Law Society of Manitoba. One member is to be a lawyer employed by the Legal Aid Services Society. Another is a person nominated by the federal government. The other seven members are chosen by the government. Four of the seven must be non-lawyers. Historically, the lay members and the other non-designated

¹¹ *Legal Services Commission Act*, S.B.C. 1975, c. 36, s. 4.

¹² *Legal Services Society Act*, R.S.B.C. 1979, c. 227.

¹³ *Ibid.*, s. 6

¹⁴ T.D. Agg, *Review of Legal Aid Services in British Columbia* (Vancouver, Ministry of the Attorney General, 1992).

¹⁵ *Miscellaneous Statutes Amendment Act* (No. 3), S.B.C., 1994, c. 51, s. 7.

¹⁶ *Legal Aid Services Society of Manitoba Act*, R.S.M., 1987 C.L. 105.

positions are filled with persons with political ties to the government. Members have renewable terms of only one year. The government of the day thus has a strong voice in the make-up of the board.

(v) Newfoundland

The legal aid scheme in Newfoundland is provided for by the *1975 Legal Aid Act*.¹⁷ The act establishes a seven-member board to administer the legal aid system. The board members are appointed for a renewable two-year term. Five of the members are appointed by the government, three of whom are drawn from a list submitted by the Law Society of Newfoundland. The other two members of the board are the Deputy Minister of Justice and the Provincial Director of Legal Aid.

(vi) Nova Scotia

The legal aid system in Nova Scotia began in 1971 on the basis of an agreement between the province and the Nova Scotia Barristers' Society that established a plan to be operated by the Barristers' Society. Under the present *Legal Aid Act*, passed in 1977,¹⁸ however, the legal aid system is governed by a statutory commission. The commission consists of seventeen members appointed by the government, seven of whom are selected from persons nominated by the Barristers' Society. A recent evaluation of legal aid in Nova Scotia undertaken by a group which included several judges, the executive director of the Barristers' Society, and several other lawyers suggested that the composition of the commission should be reconsidered.¹⁹ The review team suggested that the current arrangements reflected the thinking of the time at which the commission was established. This was to the effect that the government and the Barristers' Society knew what was best for the fledgling legal aid service and its indigent clientele. The composition of the commission would be improved, in their view, if it was drawn from three constituencies — the clients as users of legal aid, the bar as service providers and the government as funder.

(vii) Quebec

The legal aid scheme in Quebec is established under the *Legal Aid Act*.²⁰ That act establishes a legal services agency, "Commission des Services Juridiques" which governs the legal aid plan. Neither the statute nor the regulations promulgated under the act place restrictions on the composition of the board. The act does state, however, that the commission is to consist of "twelve members chosen from those groups of persons who because of their activities are likely to contribute to the study and solution of the legal problems of the underprivileged and appointed by the [government] after consultations with these groups". A full time chair and vice-chair are chosen by the government from the twelve members. In addition, the Deputy Ministers of Justice and Social Affairs or their delegates sit as non-voting *ex-officio* members of the Commission. Members are appointed for renewable three-year terms. The chair and vice-chair, however, may be appointed for a period of ten years, which

¹⁷ R.S.N. 1990, c. L.-11.

¹⁸ S.N.S. 1977, c. 11.

¹⁹ Legal Aid Review Team, *Review of Legal Aid Services in Nova Scotia* (Halifax, N.S.: Department of Justice, April 1996) at 35.

²⁰ R.S.Q. c. A-14.

“once fixed [may] not be reduced”. At the local level, legal aid services are administered by “regional legal aid corporations established by the Commission for each of the regions determined by it, taking into account the existing administrative divisions and judicial districts”. Each of the regional legal aid corporations is governed by its twelve-member unremunerated board. Membership of these boards is appointed by the commission and typically is evenly divided between lawyers and non-lawyers resident within the region in question.

(viii) Saskatchewan

Legal aid in Saskatchewan was initially established under the *Community Legal Services Act of 1974*.²¹ The act creates a statutory commission which governs the legal aid system. The composition of the eleven-member commission has changed over time. Whereas the 1974 act contained no requirement that non-lawyers be appointed to the commission, amendments in 1983²² required that four members of the commission be non-lawyers. Amendments enacted in 1989²³ provide that six of the eleven members of the commission are to be appointed by the government, four of whom must be non-lawyers. Of the remaining five members, two are to be nominated by the Law Society, two are provincial employees, one each from the Department of Justice and the Department of Social Services; and one is to be a lawyer nominated by the federal Department of Justice.

(ix) Prince Edward Island

Although legislation was enacted in 1973 to establish a legal aid system, the legislation was never proclaimed in force. At the present time, legal aid is managed within the Attorney General's Department, with services being provided essentially by a small group of staff lawyers.

(c) AUSTRALIA

Although, as in Canada, legal aid is administered at the state rather than the federal level in Australia, the federal government plays a much stronger role in the funding of legal aid in Australia than is the case in Canada. This appears, at least in part, to provide an explanation for the fact that there is a greater uniformity in legal aid from one state to another in Australia than is the case with the Canadian provinces. This is also true with respect to questions of governance. At the risk of some oversimplification, it may be said that the governance structures in Australian state legal aid schemes are rather similar to those in the Canadian provinces that have established independent statutory agencies or commissions to govern their legal aid schemes. In the Australian states, the legal aid commissions consist of five to ten members, (typically seven), who are normally appointed by the government of the state. Typically the government's ability to appoint is constrained by requirements to consult with or accept nominations from the state law society, the federal government or other interested stakeholders. None of the state boards are directly controlled by a law society.²⁴

²¹ S.S. 1973-74, C. 11.

²² *Legal Aid Act*, S.S. 1983, C. L-9.1.

²³ *Legal Aid Amendment Act*, S.S. 1989-90, c. 42.

²⁴ See, D. Crerar, “A Cross-Jurisdictional Study of Legal Aid”, Vol. III, this report.

(d) UNITED STATES

The rich and varied nature of American experience in the legal aid field bedevils any attempt to provide a brief sketch of it or, indeed, to make useful comparisons.²⁵ Unlike in Canada, Australia and England, criminal and civil legal aid are entirely separate worlds in the United States. With respect to criminal legal aid, the U.S. experience is divided between federal and state jurisdictions. Federal criminal legal aid falls ultimately under the responsibility of the Judicial Council of the Federal Circuit. Services are provided by federal defender organizations or community defender organizations, the former being more directly under the control of the Judicial Council and the latter typically being local non-profit corporations governed by boards of directors. At the state level, the states are responsible for providing criminal legal aid programs. Only sixteen states are organized at the state level, the rest being organized at county or court district levels. In some states, funds are distributed to county organizations by state-wide commissions. Some state-wide legal aid systems operate under the executive branch, some under the judicial branch and others as an independent public or private agency. In the southern states, the public defenders are appointed by the governor. In several districts of Florida the public defender is elected. In those states which operate strictly on a county or regional basis, there may be considerable variation from one county to the next with respect to both governance models and delivery systems.

There is greater uniformity on the civil side, however, because of the involvement of the federal government in funding “poverty law” offices which bear some similarity to Ontario clinics. As part of the “war on poverty” in the 1960’s, the Office of Economic Opportunity Legal Services Program was established by Congress in 1964. This program was replaced by the establishment of the Legal Services Corporation in 1974. The principal function of the corporation is the transferring of grants to a variety of clinics and other similar legal aid programs at federal, state, municipal, and county levels. Local clinics may also receive grants from state programs similar to Canadian provincial law foundations which gather and disburse the interest earned on lawyers’ trust accounts. The corporation’s board is composed of eleven members appointed by the President and confirmed by the Senate. The enabling legislation requires that no more than half of the members of the board be from the same political party. The legislation further provides that the majority of the board’s members must be lawyers.

3. THE CASE FOR CHANGE IN ONTARIO

Against this background, we return to the central governance issue facing the Review; that is whether legal aid in Ontario should continue to be governed by the Law Society of Upper Canada, or, rather, should be governed by some form of statutory agency or commission of the kind established, as we have seen, in many other jurisdictions in Canada and abroad. Our analysis of this issue is organized around the attributes of an ideal governance structure set out in Part 1 of this chapter. In each case, we compare the advantages and disadvantages of the current Ontario model and possible alternatives.

(a) INDEPENDENCE

In its submission to the Review titled “Governance of the Ontario Legal Aid Plan,” the Law Society stressed the importance of the independence of the administration of legal aid

²⁵ See M.L. Friedland, *Governance of Legal Aid Schemes, infra*, Vol. II, the text beginning at fn. 198.

from the government of the day. Moreover, it emphasized that the very purpose of its own role as the self-governing regulator of the legal profession is to preserve the independence of the bar. In our view, the Society is justifiably proud of its two-hundred-year history of independent administration of the affairs of the profession in Ontario. Further, we share the view that the independence of the bar is of fundamental importance to the proper administration of justice, and, indeed, the health of a democratic society.

It is difficult to imagine a governor of the legal aid system which could be, in this sense, more independent of government. It might well be difficult for an independent statutory agency, however constructed, to match this level of independence. We believe this to be true, notwithstanding the fact that various methods could be devised for either constraining the appointment power of the government of the membership of a statutory agency or of insulating board members from immediate pressures by establishing lengthy or staggered terms. However constructed, a statutory agency would have difficulty replicating the institutional mass of the legal profession which enables it to use its independence as a counterweight to government in some circumstances.

A more difficult question, however, is whether the Law Society can truly insulate itself from the interests of the profession. It is appropriate to ask whether the Law Society, in making decisions about the use of particular delivery models, can completely ignore the fact that a substantial number of members of the profession have a direct financial interest in the continuation of the status quo, that is, in the dominance of the judicare or certificate model in the Ontario legal aid system. Indeed, the most recent annual report²⁶ of the Plan reports that almost 40 per cent of Ontario's 17,000 lawyers in private practice participate in legal aid by providing legal services on the basis of certificates. It is also true, however, that of these 6,786 lawyers who have been retained on certificates in the 1995/96 fiscal year, just over 43 per cent of them billed less than \$10,000. Nonetheless, one suspects that a very substantial majority of lawyers who engage in litigation work have earned money, in many cases substantial amounts of money, from our current judicare system.

Our consultations around the province suggest that it would be naïve in the extreme to pretend that the Benchers, who are elected by their professional colleagues, are not under considerable political pressure to preserve the judicare system more or less in its current form. It is much more difficult, however, to assess the extent to which any particular Bencher may yield, perhaps unwittingly, to such pressures. In its submission to the Review, the Law Society,²⁷ quite properly reminds us that the Society's mandate is to govern the profession in the public interest and not in the interest of the profession. The Law Society is not a professional association whose role it is to promote the interests of its members. No doubt, the Law Society has made and must make decisions that are not popular with individual and perhaps large numbers of members of the profession. On balance, presumably, a majority of the profession sees this as a cost of self-regulation which nonetheless does not make it less attractive than the obvious alternatives.

²⁶ Ontario Legal Aid Plan, *Annual Report 1996* (Toronto, Law Society of Upper Canada, 1997) at 11.

²⁷ Law Society of Upper Canada, *Governance of the Legal Aid Plan*, submission to the Ontario Legal Aid Review (May 1997) at 7-8.

Though it is a striking fact that the three Canadian legal aid systems that are dominated by the judicare model are also the systems that are governed by the profession, we are reluctant to conclude that the Legal Aid Committee, over the years, has yielded to political pressure arising from professional self-interest. We simply have no factual foundation for such a conclusion. Nor do we doubt the sincerity of the many members of the profession who made submissions to the Review indicating their belief in the merits of the judicare system.

It is also apparent, however, that there is a widespread perception both within and outside the profession that the Law Society cannot reasonably be expected to be completely immune to the political pressure within the profession in support of judicare. The importance of this perception to the present analysis is a point to which we will return below. A statutory body or agency, on the other hand, could be designed in such a way as to insulate the body from direct political pressure from members of the profession.

(b) ACCOUNTABILITY FOR EFFICIENT USE OF PUBLIC FUNDS

Few would question the desirability of a high degree of accountability to the government, and to the public generally, of an institution that spends hundreds of millions of dollars of public money. The concept of accountability may, however, conflict to some extent with the notion that the legal aid system must be functionally independent of government.

In principle, a distinction between independence and accountability can be drawn. The legal aid system needs to be independent from government in decision-making with respect to the nature and extent of legal services to be provided in cases involving the government as the adversary of the legal aid client. The legal aid system also needs to be independent from the administrators of government agencies and programs that might prefer efficiency over the fair and effective adjudication of rights. On the other hand, a legal aid system needs to be highly accountable to the governments which fund legal aid for the proper and efficient use of public moneys.

In the first place, it is our view that the legitimate interests of government are not restricted to accountability in a narrow financial or auditing sense, that is, to ensuring that legal aid dollars are spent on the provision of legal aid services and the administration of the Plan. Increasingly, governments are concerned about the effective and efficient use of public funds and it is this interest which may create some tension between the need for independence on the one hand, and accountability, on the other. The tensions between the Law Society and the government during the fiscal crisis and surrounding the negotiations of the Memorandum of Understanding provided an illustration of this phenomenon, which tends to suggest that an increase in the tension between independence and accountability is the likely product of an era of fiscal restraint. Surely it is unrealistic, especially in a world of capped funding, to suggest that complete independence on the expenditure side can be coupled with total dependence on public funding.

A statutory agency whose membership could be appointed in whole or in part by government would likely accept a broader view of the legitimate range of the government's accountability interest than one not so composed. Whether or not such a body could more effectively reconcile tensions between independence and accountability is a much more difficult question. In our view, the answer to this question is to be found by reflecting upon the need for public confidence in the governance of the legal aid system, a point to which we return below.

(c) OBTAINING ADEQUATE RESOURCES FOR LEGAL AID

Many take the view that one of the more important reasons for maintaining the Law Society as the governor of the legal aid system is that it is likely to be more effective than other potential governors in advocating on behalf of the legal aid system in the competition for public funds. The Law Society has a long history of successful advocacy on behalf of legal aid, and it may be said that its mettle in this regard has been tested, and not found wanting, in the recent negotiations with the government concerning the creation of the Memorandum of Understanding. Although we respect these views and the long and honourable history of advocacy of this kind by the Law Society, we are less convinced that the Law Society is necessarily the only, or perhaps even the most effective, advocate for legal aid interests within government. To the extent that a particular government may perceive, whether correctly or not, that the legal aid system is inefficiently run, and to the extent that this perception or misperception rests on assumptions relating to the nature of the governance system, it might well be that government can be more effectively persuaded of the need for public resources to be devoted to legal aid by an agency whose governance structure inspires greater confidence from government with respect to these issues. Again, though we concede this to be a difficult question, we believe that it is possible for reasons such as these that a statutory agency or commission may perform a very effective role in this regard, especially if it is able to secure the continuing support of the Law Society and other professional organizations.

(d) ABILITY TO DELIVER QUALITY SERVICES IN A BROAD RANGE OF AREAS OF THE LAW

There can be no doubt about the ability of the Law Society to marshall the legal expertise required to adequately supervise and administer a scheme which attempts to offer a broad range of services through the legal aid system. The more difficult question is whether a statutory body or agency could enjoy similar success. Could a statutory body draw upon the same range of expertise and the capacity for voluntarism or special efforts now enjoyed by the Plan? Again, this is a difficult question. It is not at all clear that the willingness of members of the profession to "go the extra mile" for the legal aid client or the legal aid system is contingent upon a continuing role for the Law Society in its governance. Experience elsewhere in Canada and in the United States, certainly, suggests that the profession's capacity for voluntarism rests on the sturdier ground of professional values rather than legal aid governance structures. It is clear, however, that the success of a new body in successfully mounting a full range of legal services under a capped funding system will be dependent on the credibility of the organization with the profession and the extensive involvement of members of the profession in its leadership.

(e) EFFICIENT GOVERNANCE

Efficient governance of the legal aid system requires substantial involvement of knowledgeable and experienced lawyers who can bring a legal perspective to bear on service-delivery issues. In this respect, of course, the governance of the legal aid system by the Law Society ensures that such expertise takes a central role in management of the Plan. It is less obvious that the Law Society is well positioned to undertake programs of quality assurance. It might be difficult for the Law Society to undertake quality-assurance programs specifically targeted on legal aid service delivery. In any event, it would appear that comprehensive initiatives of this kind have not been undertaken over the years.

More important, we believe that experience in other jurisdictions has demonstrated that it is crucial to bring other kinds of expertise to bear on the management of very large publicly funded legal aid programs. In response to a perceived need of this kind, the British government appointed as six of the original twelve directors of the Legal Aid Board persons with business background and management experience. The chairman of the board is a former chairman and chief executive officer of a large chemical company. The involvement of a substantial element of non-legal expertise in the governance structure is more likely to occur, we would suggest, in the context of a governance structure based on the independent statutory agency model.

(f) COORDINATED MANAGEMENT OF THE ENTIRE SYSTEM

Under the current structure in Ontario, as we have seen, the certificate side of the system and the clinic system function as two separate entities. They are governed by two separate committees of the Law Society and they have completely separate budgetary arrangements. As already noted, these arrangements were put in place on the advice of the Grange Commission, in order to preclude the possibility that the Law Society as governor might drain away the resources of the clinic side of the system in order to expand the certificate program which has always been more popular among its members. In our consultations around the province, we became increasingly aware of the variable extent to which there exists cooperation between clinics and Area Directors in providing a coordinated approach to service delivery in particular communities. We are convinced that a lack of coordination in this respect is a significant issue for the system more generally, and that this is an issue that is most likely to be resolved by bringing the two sides of the Ontario legal aid system together under one governance structure, albeit one which continues to foster the unique features of the clinic system. This is difficult to accomplish if the Law Society remains as a governor of the Plan. We believe that it would be less difficult to effect a change of this kind if a new governance structure was developed.

(g) INNOVATION AND EXPERIMENTATION

We have suggested earlier that the exercise of priority-setting made necessary by the capping of legal aid funding is an exercise best accomplished if room is allowed for some innovation and experimentation with different types of delivery models. It must be asked, then, whether the current governance structure is conducive to innovation and experimentation of this kind. It would appear that, as a general proposition, provincial law societies tend to favour the judicare model.

In Ontario, the history of legal aid supports the view that the Law Society is wedded to this approach. Although there is a vigorous clinic system in Ontario, it would be wrong, as a matter of history, to credit the Law Society with having pioneered in this field. Further, although there are some very limited pilot projects involving alternative delivery models currently being tested, these would appear to be experiments which have been imposed upon rather than initiated by the Society. Certainly, some innovation and experimentation, for example with duty counsel, has occurred in the past and it may be that more would occur in the future under current governance arrangements. Nonetheless, it is our view that the prospects for a greater level of innovation of the type needed at the present time is more likely to occur under a new governance model.

(h) CONCLUSION

We conclude from the foregoing analysis that the governance structure of legal aid in Ontario requires reform. More particularly, we think that a number of considerations suggest that governance of the system should be transferred from the Law Society to an independent statutory agency constructed in such a way as to try to capture a fuller set of the attributes of an ideal governance model than is inherent in the Law Society model. A new model, we believe, could more effectively understand, assess and respond to the broad range of legal needs of low-income Ontarians. It could more effectively integrate management and financial expertise at the highest level of governance. It could conduct a greater level of experimentation and innovation with delivery models than is currently the case. It could more effectively coordinate the certificate system and the clinic system. We believe that it could promote confidence in the legal aid system by demonstrating convincingly that public funds devoted to legal aid are used in an effective and efficient fashion. In so doing, it could act as an effective advocate for funding levels of a kind truly required by the system.

There are, of course, some advantages to Law Society governance that are difficult to replicate in another model. The unquestioned independence of the Society from government is one such advantage. The substantial involvement in the management of the Plan by leading members of the profession is another. We would hope, however, that a new agency could be designed to preserve the independence of the legal aid system and to promote the substantial involvement of the bar, both in its governance and in its service-delivery work. In the next section, we turn to a consideration of how such an independent agency could be structured.

4. A NEW GOVERNANCE MODEL FOR LEGAL AID IN ONTARIO

(a) INTRODUCTION

For the reasons outlined above, we have concluded that the governance of the legal aid system in Ontario should be assigned to a new independent statutory agency. We have indicated why we believe that a new governance structure is desirable and what the attributes of an ideal governance structure would be. In this section, we offer a more specific proposal which attempts to strike an appropriate balance between independence and accountability, and enhances the governor's ability to provide efficient high-quality legal aid services in the context of a legal aid system with a fixed budget.

In essence, our approach is one of establishing a strong independent agency, which, by the nature of its mandate and structure, will inspire confidence in the legal aid system among members of the public, the legal profession, the government, and, most importantly, the clients served by the system. In our view, the government should play a critical role in the appointment of the members of the agency and should assume political responsibility for the definition of its mandate. It is also our view, however, that once the government has established an agency in which it can have confidence and given it a mandate, the government should, in the normal course of events, allow the agency to get on with the job assigned to it.

(b) IMPLEMENTING THE NEW VISION OF LEGAL AID

In chapter 8 of this report, we have set out our vision for the legal aid system in the form of a series of commitments exchanged between the legal aid system and the government. The first commitment, a shared view of the fundamental purpose of legal aid, relates to the mandate of the legal aid system. We have suggested that the current approach of the legal aid

system in Ontario, which is to take a broad view of the need for access to justice, is one which should continue to inform the system design. In our view, the mandate of the new agency should specifically indicate that it is to provide legal aid services, as is at present the case, in such areas as criminal law, family law, immigration and refugee law, and "poverty law". The mandate of the new agency should be stated, in our view, in an authoritative fashion, preferably in the enabling legislation for the agency.

In designing the agency that should carry out this mandate, care should be taken to ensure that the agency has the capacity to carry out the commitments which we have identified for it in our vision for the system. The agency should be able to assess, fully understand and focus on client needs. It should be able to ensure high quality services across the province. It should be able to set priorities for service delivery in order to target available resources appropriately, to cases where representation will have the greatest impact. It needs to be able to demonstrate that legal services are being provided in a cost-effective manner. It must operate a legal aid system that is flexible, innovative and experimental in order to maximize its ability to meet legal needs effectively and efficiently. The agency must be able to assume responsibilities as an agent of change in the sense that it will undertake ongoing research and policy development, on the basis of which it will fashion and promote law-reform strategies which will enhance access to justice and an efficient, integrated justice system. And it must do all of this in a way which protects resource-allocation decisions from government interference.

For its part, the government, having established an agency in which it places confidence to provide a cost-effective high-quality of legal aid service, should be prepared to live up to the commitments we envisage for it. The government should be prepared to commit itself to the independence of the legal aid system. It should ensure adequate multiyear stable funding to enable the agency to carry out its responsibilities, and it should undertake a shared responsibility with respect to the ongoing scrutiny and reform of the administration of justice in the province. The government must, of course, determine the nature of its own financial contribution to the legal aid system. But once having set the budget for the provincial contribution to legal aid and having assigned the agency a mandate to deliver a particular range of services, the government should permit the agency to determine its own method of priority-setting and service delivery in providing the mandated services.

(c) THE BOARD OF THE AGENCY

The composition of the board of the agency is of critical importance for two reasons. First, one of the justifications for establishing a new agency is that new kinds of expertise need to be brought to bear on the governance of the legal aid system. It is therefore important that the composition of the board be structured to ensure that such expertise will be present, along with substantial legal expertise. Second, the composition of the board will send out important signals to the various constituencies who have an interest in legal aid and will therefore be of some importance in developing the confidence of those constituencies in the governance of the legal aid system.

One possible means for ensuring constituency satisfaction with the composition of the board, of course, is to simply allow various relevant constituencies to appoint representatives to the board. We do not favour this approach for three reasons. First, the list of interested constituencies is very lengthy indeed. It would simply not be practical to have them all appoint members to the board. Second, it is not our view that the decision-making of the board of the agency should be made on the basis of constituency representation. There is a risk that those

who are appointed to represent constituencies will take the view that they must vote on behalf of the interests of those constituencies. We believe that more effective management of the legal aid system will result from the appointment of a board composed of members who have been appointed without such constraints on the exercise of their personal judgement. Third, we believe that the establishment of satisfactory composition of a board in circumstances such as these is a task which ought to be discharged by the government. Accordingly, subject to one reservation, we believe that appointments to the board of the agency ought to be made by the cabinet, upon the advice of the Attorney General.

The one reservation or constraint on the ability of the Attorney-General to nominate members of the board relates to the role of the Law Society. We believe that it will be crucial to the success of the new agency that the legal profession is heavily involved in the governance and administration of the legal aid scheme and that a significant number of members of the board should be appointed by the Attorney General on the advice of the Law Society. Apart from this constraint, we favour allowing the Attorney General reasonable latitude in selecting candidates for the board in order to attempt to achieve as sound a balance as possible of the various groups with a claim to be represented. We are attracted by the approach taken in the English legislation which, apart from ensuring that four members of the profession are appointed after consultation with appropriate professional bodies, simply requires that, "in appointing persons to be members of the Board, the Lord Chancellor shall have regard to the desirability of securing that the Board includes persons having expertise in or knowledge of (a) the provision of legal services; (b) the work of the courts and social conditions; and (c) management."²⁸ We would, however, expand this list to make it clear that knowledge of the work of the administrative tribunals which are so important in the poverty context is included as well as an understanding of the legal needs of low-income Ontarians.

We envisage a board which is not too large in order to ensure that individual members feel very much involved in its work. A board of eleven persons would be appropriate, in our view. Of the eleven, we would suggest that four be nominated by the Attorney General from a list of ten provided by the Law Society, two of whom must be lawyers who have significant connection with the clinic system, it being envisaged that at least one of the lawyers selected by the Attorney General from the Law Society slate would have a good knowledge and understanding of the clinic system. We suggest that the lawyers recommended by the Law Society need not be Benchers. Perhaps it would be useful to require the Treasurer of the Law Society to consult with the Chief Justice of Ontario with respect to the identity of the Law Society nominees, provided that the Chief Justice consented to such an arrangement. In this fashion, we anticipate that the Law Society nominees on the Board would be members of the profession in whom both the Law Society and the judiciary would have confidence.

In our view, although the Attorney General should not be precluded from appointing further lawyers to the board, we would expect that the board would contain substantial lay representation, including at least two members who would bring management and financial expertise to the board. Other members would bring expertise on the legal needs of low-income Ontarians and on the means by which they may be met. Consistent with our proposed focus on client needs, non-lawyers could also bring to the board the insights of other disciplines relevant to an understanding of the legal needs of low-income Ontarians and a consumer or client

²⁸ *Legal Aid Act 1988*, c. 34, s.3.

perspective. The Attorney General, in our view, should identify candidates for appointment to the board after appropriate consultation with a broad range of stakeholders and organizations having expertise in the legal needs of low-income Ontarians. Finally, it is our view that the chief executive officer of the agency should also sit on the board as a full voting member. As is currently the case in Ontario with respect to the appointment of the director of the Plan, the appointment of the chief executive officer would be made by the board of the agency with the approval of the Attorney General.

The length of the term of membership on the board is a matter of importance with respect to the independence of the board. If, as in Manitoba, board members are appointed for one-year terms, the government of the day will have more control over the appointment process than, in our view, is desirable. A new government could replace the entire board shortly after taking office. A better approach, in our view, would be to appoint for three- or four- year terms and to do so on a staggered basis. Thus, in the life of any one government, the government would have a significant impact on the composition of the board, but the composition of the board would also enjoy some stability and continuity. It should be possible to appoint an existing member for a further term. Otherwise, the possible advantages for accumulated expertise and experience might be lost. The government should be able to remove board members for "cause."

The regular members of the board could serve part-time and would be remunerated in the modest fashion typical of board appointments in the provincial public sector. It is less obvious whether the positions of chair or vice-chair should be permanent or part-time. We would envisage that they would be more extensively involved in the work of the board than regular members, but that their appointments could be on a part-time basis also. The chair and vice-chair of the board should be appointed by the Attorney General after consultation with the Treasurer of the Law Society. It might well be appropriate to have longer terms of office for the chair and vice-chair than for regular members.

(d) RESPONSIBILITIES OF THE BOARD

Broadly speaking, the board should ensure that the commitments of the agency set forth in our new vision for legal aid are implemented. Within the mandate of the agency determined by the government, the agency would be responsible for policy-making and strategic planning. The policy-making and strategic planning of the agency should be transparent to the Ministry of the Attorney General (and as well, of course, to the general public) so that progress towards stated objectives can be measured both by the agency and by the Ministry. Strategic plans for the legal aid system as a whole should be prepared by the agency, revised regularly and made available to the government and the public at large. Such plans would include: an assessment of the current and future demand for different legal aid services; the development of strategic or program objectives designed to meet those needs; and the development of performance measures against which the achievement of those objectives can be assessed. Such plans would be informed by ongoing assessment of pilot projects and current delivery models.

Of course, the strategic-planning process must not be static. The board must have the capacity to alter the strategic plan in the event of changing circumstances. Finally, strategic planning at the provincial level is necessarily related to strategic planning at the local level. Provincial planning should both respond to and inform planning at the local level.

The board would be responsible for all expenditures of public funds and would comply with government requirements concerning reports and audits. The board would assume responsibility for and be accountable for the management of the agency, and for the operation of the service-delivery system. It would determine service priorities and delivery mechanisms, and allocate resources in accord with those priority determinations.

The board would be responsible for financial management and the budgetary planning of the agency. The board would develop programs designed to ensure cost-effectiveness of service delivery, quality assurance and responsiveness to client needs. The board would also establish a research, program-evaluation and policy function which would enable the agency to discharge its responsibility to identify and assist in the reforming of systemic inefficiencies in the administration of justice and barriers to access to justice. The board would advocate for appropriate levels of funding from all funding sources. It would formulate requests for provincial funding, which would be forwarded to the Attorney General, whose officials would first vet the proposal and then shepherd it through government approval processes. The board would determine the management and organizational structure for the agency. It would develop human-resources planning and it would play a direct role in the hiring of senior management. It would develop the agency's capacity to participate in the development of an integrated justice system in collaboration with other system partners. For example, if a court services agency were to be established by the province of Ontario, collaborative interaction between it and the legal aid agency would be instrumental in facilitating the development of a more integrated approach to problem identification and resolution in the broader justice system.

(e) NAME AND ORGANIZATIONAL STRUCTURE OF THE AGENCY

In an attempt to provide some guidance for those who must ultimately assume responsibility for making decisions with respect to these matters, we thought it might be helpful to craft a picture of how we imagine the agency in terms of its name and general organizational structure.

The name of the agency should reflect, in our view, the broad range of services it provides other than those traditionally considered to be "legal aid". Thus, we prefer "legal services" to "legal aid." Further, we favour use of the term "corporation" for the agency for two reasons. First, we think it would be useful to signal, through the use of this term, that the affairs of the agency will be conducted in a business-like fashion in the sense that an explicit attempt will be made to incorporate modern management techniques appropriate to the functioning of a large agency of this kind. Second, we hope that use of the term "corporation" would assist in signalling the separateness of the legal services agency from government and enhance public confidence in its independence. For these reasons, we are attracted by the name, "Legal Services Corporation of Ontario".

Although responsibility for the design of the organizational structure of the new agency will be assumed by its board, our deliberations have touched upon organizational matters and we offer some tentative suggestions, essentially for purposes of facilitating discussion of these issues by the board.

We envisage four functional service groups or streams reporting to the senior management of the Legal Services Corporation. The four functions would be Corporate Services (information technology, human resources, financial administration,

communications, legal accounts, collections, investigations and complaints, financial assessment); Policy and Planning (policy development, planning, research, evaluation, needs assessment, quality assurance, law reform, equity issues, appeals support); Clinic System (community clinics, student clinics, central support services for the clinic system); and Program Operations (certificate systems, staff offices, duty counsel, block contracting).

We wish to elaborate on two points relating to these functional groupings. First, we suggest that the clinic system be brought into the agency as a system reporting directly to senior management rather than simply being dispersed throughout the various areas of the existing Plan and reporting to the local Area Director. Although, as we have indicated, we favour the integration of the clinic system with the rest of the legal aid system, we do not favour its dispersal. We believe that it would be very important, particularly in the short term, to preserve the integrity of the clinic system for purposes of planning, coordination and funding. The development of an integrated approach to issues such as the development of community boards and consistency of service delivery suggest that the preservation of a separate reporting line for clinics is an appropriate approach. We do favour, however, a greater degree of interaction between clinics and the local Area Directors. We would envisage, as a possibility at least, that in the new service delivery system the Area Director or designate might sit on the local clinic's board, and conversely a clinic representative would sit on the local Area Committee.

Second, we would emphasize the importance of the policy, program evaluation and planning function in the new agency by assigning responsibility for policy and planning at a senior level. The policy and planning function will have a very important role to play in an agency that is innovative and experimental in its service-delivery models and in attempting to act as an agent of change within the legal system more generally.

Finally, we would suggest an organizational structure that is relatively flat. In particular, we do not favour the insertion of a regional level of management of the legal aid system to which local Area Directors, and perhaps clinics, would report. One argument for establishing a regional level of governance is that both the courts and the Crown Attorneys have moved from a county based organization to an organization based on judicial regions, of which there are now six in the province. The legal aid system which is still organized on a county-based model, appears out of step. We do not find this consideration persuasive. It is not at all obvious, we suggest, that the considerations weighing in favour of regional courts administration also apply to legal aid. Legal aid appears to have a greater need for some "hands on" administration at the local level. Nonetheless, it can be argued in support of a regional structure that there might be some need for separate reporting and policy-making at this level. For example, it might be that decisions with respect to the particular mix of delivery models to be used in a particular region could be made at that level. Our own view, however, is that decisions with respect to the mix of delivery models to be used ought to be made centrally. Indeed, we are not persuaded that there are issues that need to be determined at the regional level and thus we do not consider the establishment of a regional level of legal aid administration to be warranted. No doubt there could be greater coordination of activities of various kinds by the Area Directors within a particular region. To accomplish this objective we would suggest that one of the Area Directors within each region be identified as the Regional Senior Area Director for the purpose of carrying out coordination activities of this kind. If the experience of administration of the new system demonstrates a need for a stronger role at the regional level, this question could obviously be revisited.

In our picture of the new agency, then, the Area Director would continue to be the face of the non-clinic legal aid system in the local community. In our meetings across the province, we have been impressed with the importance of the role performed by Area Directors. On the other hand, it is not clear to us that separate Area Directors are necessarily required in each of the communities which now have an Area Director of their own. We would suggest that the number of Area Directors could be reduced by assigning some the responsibility for more than one community in their particular region of the province. This would be conducive to greater consistency in administration in areas that are brought together. Needless to say, we would favour such an approach only if it could be demonstrated that reducing the number of Area Directors would be consistent with preserving quality of service delivery and would effect significant cost savings for the legal aid system. We suggest, as well, that the increased emphasis on management of the system could usefully be signalled by a change of title from Area Director to Area Manager. The increased emphasis on management should also be made manifest in a local cyclical strategic-planning exercise parallel to the process carried out at system-wide level. Local strategic plans would inform and be informed by the system-wide process and would be subject to agency approval.

5. RECOMMENDATIONS

1. Governance of the legal aid system in Ontario should be transferred from the Law Society to an independent statutory agency.
2. The government should play a critical role in the appointment of the members of the agency and should assume political responsibility for the definition of its mandate. Once the government has established an agency in which it can have confidence and has defined its mandate, however, the government should, in the normal course of events, allow the agency to proceed with the job assigned to it.
3. The mandate of the new agency should specifically indicate that it is to provide appropriate legal aid services across a broad range of service areas, such as criminal law, family law, immigration and refugee law, and “poverty law”. The mandate of the new agency should be stated in an authoritative fashion, preferably in the enabling legislation for the agency.
4. The agency should be designed in such a way as to ensure that it has the capacity to carry out the commitments assigned to it in the new vision for legal aid in Ontario, set out in chapter 8.
5. The board of the agency should be constituted in the following manner:
 - The board should have eleven members. The members should be appointed to the board by the Lieutenant Governor-in-Council, upon the advice of the Attorney General.
 - Of the eleven members, four should be nominated by the Attorney General from a list of ten provided by the Law Society, two of whom must be lawyers who have a significant connection with the clinic system, it being envisaged that at least one of lawyers selected by the Attorney General from the Law Society slate would have extensive knowledge and understanding of the clinic system. The lawyers recommended by the Law Society need not be Benchers.

Consideration should be given to requiring the Treasurer of the Law Society to consult with the Chief Justice of Ontario with respect to the identity of the Law Society nominees.

- The chief executive officer of the agency should sit on the board as a full voting member. In other respects, the Attorney General should be accorded reasonable latitude in selecting candidates for the board in order to achieve as sound a balance as possible of the various groups with a claim to be represented on the board.
- The legislation establishing the agency should provide that the Attorney General, in appointing persons to be members of the board, shall have regard to the desirability of ensuring that the board includes persons having expertise in or knowledge of :
 - (a) the provision of legal services;
 - (b) the work of the courts and tribunals;
 - (c) management; and
 - (d) the legal needs of low-income Ontarians.

6. Members of the agency board should be appointed for three- or four-year terms on a staggered basis. Individual members would be eligible for consideration for a further term.
7. The regular members of the board should be part-time members, as could the chair and vice-chair.
8. The chair and vice-chair of the Board should be appointed by the Attorney General after consultation with the Treasurer of the Law Society. The chair and vice-chair should have longer terms of office than regular members.
9. The responsibilities of the board should be as follows:
 - Within the agency's mandate, the board should be responsible for policy-making and strategic planning, and conducting these activities in a manner which is transparent to the Ministry of the Attorney General and the public at large.
 - The board would be responsible for formulating cyclical strategic plans which would set the overall objectives for the legal aid system by assessing current and future needs for services, developing strategies to meet those needs, and setting performance measures against which it can be determined whether the achievement of these objectives has been met.
 - The board would determine service priorities and allocate resources in accord with those priority determinations.
 - The board would be responsible for financial management and budgetary planning.

- The board would formulate requests for provincial funding, which would be forwarded to the Attorney General, and act as an advocate for appropriate levels of funding.
- The board would be responsible for all expenditures of public funds and comply with government requirements concerning reports and audits.
- The board would be responsible for and accountable for the management of the agency and the operation of the service-delivery system.
- The board would develop programs designed to ensure cost-effectiveness of service delivery, quality assurance, and responsiveness to client needs.
- The board would establish a research, program-evaluation, and policy function.
- The board would determine the management and organizational structure for the agency.
- The board would develop human-resources planning and play a direct role in the hiring of senior management.
- The board would develop the agency's capacity to participate in the development of an integrated justice system in collaboration with other partners in the justice system.
- The board would assume responsibility for developing a management information and information-technology strategy for the agency.

10. The name of the agency should be the Legal Services Corporation of Ontario.

11. A number of tentative suggestions concerning the organizational structure of the new agency are offered. We suggest the creation of a separate reporting line for the clinic system which would report to senior management at the same level as the other three functional groups, operations, corporate services and a new program-evaluation and planning function. To signal the increased emphasis on comprehensive management of the system, the title Area Director should be replaced by Area Manager. We suggest that the organizational structure be relatively flat and, more particularly, not include the insertion of a regional level of management of the legal aid system. With respect to the latter point, however, we recommend that one of the Area Managers within each region of the province be identified as the Regional Senior Area Manager for purposes of carrying out coordination of activities within the region.

12. Although we favour continuation of the current role performed by local Area Directors, the number of Area Managers could be reduced by assigning to some the responsibility for more than one community in their particular region of the province, provided that reducing the number of Area Managers in this way would effect significant cost-savings for the legal aid system.

13. There should be a local cyclical strategic-planning exercise parallel to the process carried out at system-wide level. Local strategic plans would inform and be informed by the system-wide process and would be subject to agency approval.

AN IMPLEMENTATION STRATEGY

The Memorandum of Understanding (MOU) between the Law Society and the Ontario government expires on March 31, 1999, the end of fiscal year 1998/99. Both the Law Society and the government have indicated their commitment to abiding by the terms of the MOU until its expiry.¹ This chapter outlines a practical and financially feasible way in which our proposals for major changes to the governance structure and operations of the system, all of which raise numerous complex issues, could be implemented. The implementation strategy outlines a suggested timetable and transitional funding arrangements, and highlights major issues to be resolved by the government, the Law Society, and the new Legal Services Corporation to ensure a transition that maximizes the services available to low-income people, ensures the uninterrupted pay-out of outstanding accounts to legal-service providers, and offers assurance that the move to a new reformed system is affordable for government.

1. TIMETABLE

(a) PHASE ONE: RECEIPT OF REPORT TO ENACTMENT OF LEGISLATION

Upon delivery of our report to the Ministry of the Attorney General, it is anticipated that a policy development and legislative-drafting process will be undertaken, with such additional consultations as the government considers appropriate.

We recommend that the following provisions be set out in the new *Legal Aid Act*:²

- a substantive provision setting out the purpose of the legal aid system,
- a provision establishing the Legal Services Corporation of Ontario and its corporate status,
- a description of the new board of directors and provisions addressing such matters as their appointment, tenure/removal, and indemnity,

¹ As indicated at the time of the announcement of our comprehensive review of legal aid, the Ministry of the Attorney General, having previously agreed to live within the terms of the MOU, stated that it intends to introduce legislation in the fall of 1997 with the goal of having a new legal aid program in place within the following year. The Law Society indicated at its May 1997 Convocation that it would agree at that time only to carrying out its governance responsibilities over the legal aid system until the end of the MOU.

² While some of the provisions recommended are currently provided for under the existing legislation or parts of the current administrations business practices, the list provided identifies matters that we believe ought to be referred to specifically in the new Act.

- the duties and responsibilities of the board, including both central-support and direct-service matters. The central supports could include matters such as:
 - determining and monitoring the service needs of clients;
 - developing criteria for setting priorities among service needs;
 - setting priorities;
 - developing and experimenting with innovative service models to meet needs;
 - establishing and implementing quality-control mechanisms;
 - guaranteeing independence of services;
 - establishing a needs-based financial eligibility-assessment/client-contribution system;
 - undertaking research/policy development for the corporation and the broader justice system;
 - providing or coordinating administrative support services, including technology, personnel, accounting, account-processing, and audit functions; and
 - maintaining linkages with other parts of the justice system, and advocating funding required to meet needs.
- On the direct-service side, board responsibilities could include:
 - establishing geographic and/or client-based service areas;
 - continuing/establishing community clinics and Area Offices for each area;
 - continuing to administer the judicare component, including criteria for panel membership, tariffs, and case management ;
 - establishing Staff Offices where numbers and service needs warrant;
 - establishing a central appellate capacity/support service;
 - maintaining legal-research services, a core group of investigators, and other non-legal staff to assist duty counsel, staff counsel, and the private bar;
 - approving appeals to the Court of Appeal for Ontario;
 - appointing Area Managers to manage non-clinic services and coordinate with clinics;
 - providing a framework for the election of community boards to govern clinics;
 - establishing advisory committees, as appropriate;
 - establishing private-bar oversight/advisory committees for each area of substantive law.
- The duties and responsibilities of Area Managers could include matters such as,
 - establishing local service priorities based on central priorities and local circumstances;

- establishing a main intake office and satellites, as necessary;
- establishing intake/assessment capacity; retaining paralegals, interviewers, case workers, and so on to support intake service, duty counsel, Staff Offices (where available), and private bar;
- establishing salaried and contract duty counsel services; issuing judicare certificates; approving case-management plans, discretionary fees, and disbursements; establishing linkages with community services and the community clinic, where numbers warrant;
- establishing Staff Offices in criminal, immigration and refugee, or family law; where priorities dictate, providing access to civil law services both within the corporation and through other mechanisms; and
- approving appeals and judicial reviews.
- the duties and responsibilities of the clinic director/community boards could include such matters as:
 - fulfilling the current mandate by determining most appropriate priorities and mechanisms to implement the priorities pertinent to it;
 - coordinating local services with Area Managers;
 - providing summary intake/referrals for the Area Office; and
 - providing advice to board on province-wide priority setting.
- the funding for the corporation to be based on a:
 - rolling three-year strategic-plan, business plan, and budget, approved each year and assured for the three-year period, except in extraordinary circumstances;
 - board allowed to carry surpluses and deficits within the cycle (and, with the Attorney General's approval, between cycles);
 - clinic budget maintained at least at current level through first cycle;
 - transition funding in first post-MOU year; and
 - guaranteed payment of authorized accounts.
- the transition arrangements resulting from negotiations with the Law Society

At the same time, we recommend that the Ministry begin to identify people to serve on the board of the Legal Services Corporation of Ontario, after appropriate consultation with, among others, interested organizations having expertise in the legal needs of and delivery of legal services to low-income Ontarians. As well, the Ministry should undertake discussions with the Law Society regarding a negotiated framework for ensuring the smooth transfer from the Law Society's governance of legal aid to the new administration. This framework should include an opportunity for the new board to work with the Law Society, before the expiry of the MOU, to begin to establish the infrastructure of the new system.

(b) PHASE TWO: FROM ENACTMENT OF LEGISLATION TO THE END OF MOU

(i) Establish Board

Immediately following enactment of enabling legislation, the Review recommends that the new board be set up. We recommend that the board work closely with the Law Society during this phase to prepare for the transfer of the administration of the legal aid system to the Legal Services Corporation of Ontario.

(ii) Continue to Issue and Pay Certificates under Current System

While the new administration prepares for Phase Three, we recommend that the existing administration continue to issue and pay certificates on a business-as-usual basis. The number of certificates to be issued over the course of the final year of the MOU (prior to transfer of authority to the new board) should be agreed upon by the new board and the Law Society in light of future funding commitments to the Legal Services Corporation of Ontario by the provincial and federal governments, and the implementation/start-up plan of the corporation.

(iii) High Priority Issues for the Board during Transition

Subject to arrangements to be negotiated by the board, the Law Society, and government (where appropriate), the following is a suggested list of issues to be acted upon by the board during this transitional phase.

a. Establish Service Areas and Recruit Area Managers

We suggest early recruitment of Area Managers to develop the new aspects of the local delivery system, with priority given to creating an early intake and assessment system capacity. In moving from local Area Directors to Area Managers, attention should be paid to determining the appropriate number and location of Legal Services Corporation Area Offices. The number and location should be based on population, geography, and what is known about the nature of legal needs and related services in the area. One Area Manager may be responsible for a number of offices or satellite offices. The board need not establish all of these offices at once, but should begin the process as quickly as possible especially in high-volume areas. While the emphasis on the job functions of the Area Manager will be management, coordination, priority-setting, and quality control, we would expect that many of the existing Area Directors would be appropriate candidates for these new positions.

The recruitment of Area Managers and the subsequent hiring of local staff are critical to the success of this model. Area Managers need to be in place quickly in order to initiate a consultation process to develop and recommend a local delivery model and service priorities, and to lay the foundation for the expanded summary advice and duty counsel system described above.

b. Undertake Preliminary Needs Assessment

In order that Area Managers can begin to operate the new intake system, the board will have to prepare a preliminary assessment of needs and priorities. Some of the information required for the needs assessment is found in this report and the background papers, but the board should immediately begin meetings with clinics, community and legal organizations, and, if the judges consider it appropriate, the judiciary for further information. In our view, the board should first determine needs based on consultations, and then put in place a longer-range mechanism to identify and access client needs.

c. Develop Criteria for Priority-Setting

To meet the service-management demands of living within a capped budget, the Review has recommended that the board be responsible for setting province-wide priorities in relation to the broad range of legal needs of its clientele. In so doing, we recommended earlier in our report that the board address various considerations in fulfilling this task, most particularly, the impact which the provision or denial of service would have on the individual applicant and other potentially needed services.

d. Develop Early Assessment and Intake

Central to our proposed new system is the capacity to assess cases early and effectively. This allows a determination of the potential for immediate referrals, whether to community services or to the legal aid case-service methods we propose, and, for the remaining cases, the determination of the nature and extent of the service required. It calls for effective interviews, strong knowledge of legal remedies and strategies, as well as other service organizations in the community, a continuous strategic assessment of competing needs for scarce resources, an ability to assess legal-service-delivery options, and the ability to match the appropriate delivery model to the legal needs of the client.

e. Develop Expanded Duty Counsel System

It would be the responsibility of each of the new Area Managers to implement a plan for a more sophisticated duty counsel function. This will include recruitment of lawyers, whether in a Staff Office or in a block-contract arrangement, and supervised paralegal staff, training, standard setting, and supervision to support expanding the role of duty counsel. We believe that this should be identified as one of the initial structural reforms to be put in place by the new Legal Services Corporation.

f. Develop Coordinated Local Delivery Plans

We have identified local coordination of legal services as an important responsibility of the board, Area Managers, community boards, clinic directors, and head office. We recommend that during Phase Two, all parts of the legal aid administration ensure that local linkages are made, and that community needs are identified and responded to appropriately in the development of local service-delivery plans.

The delivery-model plans should be developed in light of our recommendation that Area Managers be responsible for the local legal aid office (that may or may not have satellite sites). The local office will provide clients with family, civil, and criminal intake and assessment, as well as summary advice and referral to other services. As at present, clinics will also have a local presence and may be available to do some summary intake for the main office.

g. Continue to Develop an Integrated Technology Strategy

At the same time as the framework and implementation plan for the “front-end” delivery of legal aid services is developed, the Legal Services Corporation administration and the Ministry of the Attorney General should work closely to ensure that the legal aid system and its information-technology enhancements are coordinated with those of the Ministry, the courts, the bar, the police, correctional facilities, and appropriate community agencies. This will support our long-term vision of creating a legal aid administration that can facilitate the transition to out-of-court intake in criminal matters, and can use technology effectively in other

aspects of its operations, including participating effectively in automated case-management systems.

h. Develop Framework for Transfer of Governance Authority

In order to ensure a smooth transition to the new system, the board, the Law Society, and government (where appropriate) should also prepare a strategy for the transfer of responsibility. This would address a broad range of issues, including:

- firm commitments to pay in a timely way for outstanding accounts for work done on certificates issued to the date of transfer to the new authority;
- transferring records and providing access to current records of the Plan;
- developing an organizational structure for the new legal aid authority;
- setting of conflict of interest guidelines for the board;
- developing public-accountability procedures, such as a strategic plan, annual reports, data collection, and accounting schemes;
- developing human-resource plans, transfer of assets and assignment of leases;
- providing access to the current facilities for the new administration;
- transferring of liabilities, litigation, complaints;
- determining an effective date of transfer;
- determining dispute-resolution provisions between the current governing body and the future governing body and the government;
- determining insurance and indemnity issues;
- setting staff-compensation levels under the new system and determining the definition of “employer” for labour-relations purposes, especially in relation to the clinic system; and
- start-up costs.

It is recommended that the current and future administrators of the legal aid system work to ensure that the transfer is undertaken with a view to continuing to have the benefit of the skills and experience of as many existing staff as possible.

i. Establish Head Office Support Structures

To ensure a seamless transition for the clients, lawyers, and other service providers of the legal aid system, it is critical to provide support to the board to assist it in carrying out its early responsibilities. In particular, we urge that the new board make arrangements with the Law Society to share or assume the existing administrative, policy, research and evaluation, technology, and operational supports. It should also determine any additional expertise required so that it can achieve its mandate of determining and ensuring responsiveness to client needs, public accountability, the provision of high-quality service, and innovation in relation to service delivery. The board should begin to develop the sophisticated planning and policy capacity needed to service this mandate. In this phase, the board may also wish to enter into

agreements to assume some of the Clinic Funding Committee's and Plan's responsibilities for audit, technology, and human-resource functions.

j. Commence Multi-year Planning

During this phase, we also recommend that multi-year strategic planning be commenced by the board. In developing this strategic plan, the board should develop proposals in relation to financial operations; technology; legal support services, such as research, evaluation, and policy development; local and provincial service-delivery plans; and law-reform capacity. We see the provision of its multi-year strategic plan to government as part of the new Legal Services Corporation's public-accountability requirement.

(iv) Maintain Operations of Clinic System

As there will be few operational changes to the clinic system during this phase, we recommend that the Clinic Funding Committee (CFC) of the Law Society continue to manage the clinics within its existing budget. This will allow the new board to focus on the other major tasks that we have identified. Any vacancies in the membership of the CFC should be filled as contemplated by the existing Regulation.

(v) Funding of Phase Two

In that the Law Society will still be governing the delivery of legal aid services and that the MOU funding arrangements will still be in place, we recommend that the provincial government provide transition funding to the board for costs incurred during this phase in order to ensure a seamless transition that has no adverse impact on the clients.

An alternative source of funding for some of the start-up infrastructure costs could be the Ministry's Courts Administration budget and, to some extent, the federal government. In developing our plan for an integrated approach to the delivery of legal aid services, we have attempted to anticipate and accommodate both the federal and the provincial government's strategy for increasing early efficiencies in the criminal and civil justice process. We believe it is appropriate to seek funding from them to support Ontario's transition to a less court-focused approach, given that our model will produce savings for both governments' litigation functions and may serve as a national model. Pilot-project funding from the federal government for the start-up and evaluation of the intake and assessment functions of our model would be consistent with and helpful to furthering the national access to justice agenda.

(c) PHASE THREE: GOVERNANCE OF THE LEGAL AID SYSTEM BY THE LEGAL SERVICES CORPORATION OF ONTARIO

The Review recommends that the board should, as a matter of high priority, address the following major issues immediately following the transition (post MOU):

(i) Expand Delivery Models

Once the new governing structure is established, the board should turn its attention to the goal of expanding delivery models for legal aid to maximize its ability to meet the legal needs of clients effectively and efficiently. Accordingly, at this stage, we believe it is appropriate to implement the expanded duty counsel function, commence the development of a Staff Office capacity within the system where numbers and needs warrant, and develop standards for block contracting of cases. The board will assume responsibility for judicare services, including issuance of certificates (through Area Managers), establishment of tariffs, and assessment and

payment of accounts. Quality-assurance measures ought to be implemented, and the tariff reviewed for adequacy.

(ii) Extend Clinic System

At the same time, a plan should be developed for closing the geographic gaps in the clinic system. Those areas of the province that do not have a general clinic should be identified and provided with “poverty law” services, in accordance with their needs. Consultations on expansion of specialty clinics should also take place.

(iii) Ensure Coordination of Legal Aid Services at a Local Level

With the expansion of the clinic system and the development of alternative methods of delivering legal services, there should be continued coordination of all legal aid services at the local, and possibly regional, level.

(iv) Board Control Over Budget and Operations

The new board will assume all of the Legal Aid Committee’s and Clinic Funding Committee’s responsibilities for the legal aid operations in Ontario and will be responsible for the administration of the Area Offices, current clinic system, and central-office budgets. As noted in chapter 14, the clinic system budget should be guaranteed for three years following the transfer of operations to the new corporation.

(v) Ensure Payment of Outstanding Accounts Pursuant to the Arrangements Entered into in Phase Two

All outstanding accounts to lawyers that accrued under the old administration should be paid out in accordance with rules in place at the time that these certificates were issued and in accordance with the arrangements entered into in Phase Two between the Law Society and the new board (and the government).

(vi) Implement Public-Accountability and Evaluation Capacity

In this phase, the head office of the Legal Services Corporation of Ontario should develop the capacity to ensure that it is meeting its public-accountability obligations. This should include confirming that the best current management practices are in place, that information is being collected and evaluated to ensure that clients’ needs are being met in flexible, cost-effective, and innovative ways; that competent legal services are maintained through various quality-assurance techniques; and that the system is capable of setting priorities for service delivery in order to target available resources to the most appropriate cases.

(vii) Funding of Phase Three

In the first full year of the new system, there will be additional costs incurred as new delivery mechanisms are implemented. The savings we anticipate from better case assessment, managed intake, expanded duty counsel, and improved use of non-lawyers and other support should result in reduced judicare costs a year or two after the new initiatives are put in place.

Assuming that legal aid certificate funding remains stable at its 1998-1999 level of \$167.2 million and that the Law Society issues roughly the same number of certificates in 1998-1999 as in 1997-1998 (with a modest increase being possible), funds will be available within the 1999-2000 budget to meet the costs of the transition to the enhancements proposed in this

report. Expenditures in 1998-1999 include the repayment of loans, all of which will be retired in that year.³

2. RECOMMENDATIONS

We recommend that the proposals set forth in this report should be implemented in three phases, the details of which are outlined in this chapter. Summarized briefly, our proposals should be implemented as follows:

- (a) The first phase, from receipt of this report to enactment of legislation, would involve a policy-development and legislative drafting process within the Ministry of the Attorney General. At the same time, the Ministry should begin to identify people to serve on the board of the Legal Services Corporation of Ontario and should enter into negotiations with the Law Society concerning the framework for a smooth transition to the new legal aid system.
- (b) The second phase, from enactment to expiry of the Memorandum of Understanding in March of 1999, would involve the establishment of the board of the Legal Services Corporation and the development and implementation of a comprehensive transition plan which will ensure a seamless transition for the clients, lawyers and other service providers of the legal aid system and establish appropriate structures to enable the new agency to assume its responsibilities in March of 1999.
- (c) The third phase, post-March 1999, would be the assumption by the Legal Services Corporation of Ontario of responsibility for discharging its statutory mandate and the implementation of its strategy for providing a needs-focused, high quality, prioritized, and cost-effective legal aid service that will be designed to meet the broad range of legal needs of low-income Ontarians.

³

See ch. 14 for a more in-depth discussion of our recommended funding and financial arrangements for the Legal Services Corporation of Ontario.

PART III: SUMMARY OF RECOMMENDATIONS

SUMMARY OF RECOMMENDATIONS

The Ontario Legal Aid Review makes the following recommendations:

CHAPTER 4 THE LEGAL NEEDS OF LOW-INCOME ONTARIANS

1. The design of the legal aid system should be based on the assessment of the specific legal needs of low-income Ontarians.
2. The design of the legal aid system, while reflecting these needs, should also address the diversity of special needs presented by such groups as ethnic, racial, cultural, and linguistic minorities, persons with disabilities; Aboriginal communities; women; children; youth; and the elderly.
3. The legal aid system should enhance its central and local capacity to gather and assess information regarding client needs.
4. The legal aid system should more effectively rely upon the clinic system, Plan administrators, and other service providers as a means of systematically gathering information with respect to legal needs.

CHAPTER 5 A FRAMEWORK FOR SETTING PRIORITIES FOR LEGAL AID

5. In a capped legal aid system, resources should be allocated in accordance with priorities set in light of the following considerations:
 - the importance of consultation and environmental scanning of needs;
 - the importance of responding to a broad range of needs;
 - the need for strategic oversight at the system-wide level, coupled with responsiveness to local conditions;
 - the limitations of the “negative liberty” (or risk of incarceration) test in priority-setting;
 - the importance of integrating delivery-model issues into the priority-setting process;
 - the importance of focusing the priority-setting debate on client impact; and
 - the importance of priority-setting being subject to revision in light of experience in an evolving social and legal environment.

CHAPTER 6 THE LEGAL AID SYSTEM IN CONTEXT

6. The legislative mandate for the legal aid system should assign a high priority to its role as a proactive change agent in researching, developing, publicizing, and promoting substantive and procedural reforms to the broader justice system; in turn, the system

should develop the necessary human-resource capabilities (internal and external) to play this role effectively.

7. The chief executive officer of the legal aid authority should develop close institutional linkages with other partners in the justice system including the governance bodies of any new unified administrative agency for the courts and any unified administrative justice system agency that might be created.
8. The Ontario legal aid authority, either alone or, preferably, in concert with other provincial legal aid agencies, should develop reform proposals that require federal cooperation, and apply pressure on the federal government to be responsive to these reform proposals (rather than externalizing the costs of any existing inefficient federal proceedings onto provincial legal aid plans).

CHAPTER 7 THE CHOICE OF DELIVERY MODELS FOR LEGAL AID

9. The Plan should seek to narrow the gap between full representation and no representation through provision of a much greater variety of legal services in order to assist a broader range of potential clients by invoking a wide spectrum of delivery mechanisms, including, for example, public legal education, duty counsel, supervised paralegals, Staff Offices, community legal clinics, judicare, and block contracting.
10. The choice of delivery models must be highly sensitive and adapted to context—the legal context in which services are required, the geographic context where they must be provided, and the context of particular client groups with special needs who require these services.
11. In choosing delivery models in particular contexts, a premium should be attached to early intervention to promote issue identification, settlement, mediation, diversion, and referral to other community agencies, rather than withholding legal assistance until disputes have become more intractable and costly to resolve, which may be counter-productive and impose greater demands in the long term on both the legal aid system and the underlying justice system.
12. While different delivery models will often be complementary to one another, there are also substantial advantages, in various contexts, of creating competing delivery models, for example, judicare and Staff Offices in criminal law, family law, and refugee/immigration law in larger urban centres.
13. In choosing delivery models in particular contexts, the Plan should be sensitive not only to relative cost considerations, but also to relative quality considerations, in particular the ability to prescribe and implement an effective quality-control regime in order to control problems of supplier-induced demand and quality variability or deterioration.

CHAPTER 8 RENEWING THE COMMITMENT TO LEGAL AID

14. The legal aid system and the province of Ontario should manifest their renewed commitment to legal aid by formally exchanging and recording in the *Legal Aid Act* the following set of understandings:

(a) A Shared View of the Fundamental Purpose of Legal Aid

Access to Justice

- The fundamental objective of the legal aid system is to promote equal access to justice by identifying and meeting the diverse legal needs of qualifying individuals and communities.

(b) Commitments of the Legal Aid System

A Needs Based System

- The legal aid system shall identify and assess the needs of those who are unable to afford legal services and seek to meet those needs appropriately.

Quality of Service

- The legal aid system shall be responsible for ensuring that the legal services it provides are of consistently high quality across the province.

Priority Setting

- The legal aid system shall set priorities for service delivery in order to target available resources to the most appropriate cases.

Cost Effectiveness and Accountability

- The legal aid system shall be responsible for assuring the public that legal services are being provided in a cost-effective manner and that effective use is being made of modern information-technology and management techniques.

Service-Delivery Models

- The legal aid system shall be flexible, innovative, and experimental with respect to service delivery in order to maximize its ability to meet legal needs effectively and efficiently.

Law Reform

- The legal aid system shall undertake ongoing research and develop strategies to implement law and procedures which encourage access to justice and an efficient, integrated justice system.

Diverse Needs

- The services of the legal aid system shall be responsive to persons with diverse needs, including ethnic, racial, cultural, and linguistic minorities, persons with disabilities; Aboriginal communities; women; children; youth; and the elderly.

Governance

- The legal aid system's governance structure must be one that will attract public credibility and legitimacy and will have the capacity to effectively discharge its mandate in the public interest.

(c) Commitments of Government

Independence

- The government shall commit itself to the independence of the legal aid system from the government.

Funding

- The government shall ensure adequate, multiyear, stable funding to enable the legal aid system to carry out its responsibilities.

Systemic Reform

- The government shall commit itself to ongoing scrutiny and reform of those features of the underlying justice system that constitute major determinants of legal aid needs.

CHAPTER 9 CRIMINAL LAW LEGAL AID SERVICES

15. The legal aid authority should continue to seek a high level of cooperation and participation from the private bar in relation to the delivery of criminal legal aid services.
16. The legal aid authority should implement a flexible and locally responsive model for the delivery of criminal legal aid services that will allow administrators of the legal aid program, lawyers and other service providers, and clients of the system, to develop service-delivery options that maximize the volume of high-quality service that can be sustained within a capped budget.
17. The legal aid authority should develop an effective way of assessing prospective criminal law clients' needs as individuals and of setting priorities among those needs based on the impact of the provision or the withholding of services in the circumstances.
18. The delivery of criminal legal aid services should have three components: managed intake, assessment, and straightforward dispositions; service options for complex cases; and appellate advocacy.
19. The structure of service delivery for Phase One—Managed Intake, Assessment, and Straightforward Dispositions—should be as follows:
 - (a) The responsibilities of the Area Directors should include:
 - (i) the development of a comprehensive and managed approach to intake and case assessment; and
 - (ii) the use of duty counsel to assist clients in relation to summary legal advice, adjournments, bail hearings, withdrawals, straightforward guilty pleas and sentencing, Crown screening, Crown disclosure, pre-trial conferences, and representation on trials requiring limited preparation.

- (b) There should be a duty counsel office in each courthouse. Duty counsel services should be provided by salaried or fee-for-service lawyers available for four week-rotations at a minimum. Duty counsel services should be provided at correctional facilities in order to take advantage of recent changes to the *Criminal Code*.
- (c) With the exception of trial representation, these preliminary services should normally be provided without the expense of an eligibility assessment. However, the Area Director, and his or her staff, should, at their discretion, be able to assess people at any point in the process where there is good reason to believe that the person can afford to retain private counsel and legal aid would spend more money providing service to the client than it costs to do the actual assessment. This would normally occur at some point before a trial occurs.
- (d) In a case where a successful financial assessment is completed, the Area Director or his or her designate should:
 - (i) assess the client's case to evaluate how much time will be required to prepare the case effectively to ensure trial fairness, and
 - (ii) determine whether the case is one that can be prepared within the time available for duty counsel, or whether the client should be provided with choice of service delivery.
- (e) The guidelines used by the Area Director or his or her designate to determine the appropriate service-delivery mechanism for a particular case should be developed in conjunction with the private bar. The private bar should also work with the Area Director to monitor and assist duty counsel to ensure that clients are getting quality legal representation from all parts of the criminal legal aid system.

20. The structure of service delivery for Phase Two—Service Options for Complex Cases—should be as follows:

- (a) The client should be provided with choice of counsel. Service delivery may be available through the private bar, through local Staff Offices, or from counsel working on block contracts.
- (b) The design mix for the delivery of criminal legal aid services in each locale should be proposed at a local level (and approved by head office) having regard to client needs, including geographic, linguistic, and other special needs.
- (c) Where both appropriate and feasible, Staff Offices should be set up to provide criminal legal aid services in communities across the province. The offices should be staffed with a range of persons, including lawyers and case workers (*e.g.*, supervised paralegals, bail officers, social workers, community workers, criminal investigators, and interpreters). The operation of the Staff Office should be linked to the duty counsel program.
- (d) Lawyers employed by the Staff Office should perform a range of functions, including advice counsel, trial counsel, or appellate counsel. Responsibilities may be rotated within the office, depending on range of expertise and seniority.

Salaried duty counsel staff should also have access to internal rotation opportunities within the Staff Office.

- (e) Clients of the Staff Office should, where feasible, be able to request choice of counsel within the office.
- (f) All cases referred beyond the early managed intake phase to either private bar or Staff Office counsel should be subject to case-management standards.

21. With respect to Phase Three—Appellate Advocacy—all appeals to the Court of Appeal should be approved at the provincial level and supported by a central research facility. Summary conviction appeals should be handled by the local Staff Offices or by local practitioners on certificate or block contract.

22. The services provided by private lawyers, staff lawyers, duty counsel, and other staff should be subject to appropriate quality-assurance mechanisms. Standards should be set for lawyers wishing to be on panels to accept legal aid certificates.

23. Area Directors should be responsible for supervising quality assurance (including controlling panel membership), providing consistency in eligibility determinations, building strong local-bar input into the delivery of criminal legal aid services, and ensuring that client needs are being met appropriately.

24. Provincial or regional support from the legal aid administration should be made available to local service providers through: dedicated research and other non-legal support services, quality-assurance programs, policy development, and law-reform capacity.

25. A Defence Bar Advisory Committee should be set up in each community, made up of members of the local criminal bar who will provide assistance to the local Area Director or senior officials within the legal aid authority:

- (a) advising on guidelines for the Area Director in relation to discretionary decisions;
- (b) advising on law and procedural reforms; and
- (c) advising on case-management standards, quality assurance and mentoring programs.

26. The structure of service delivery for young offenders should be as follows:

- (a) The delivery of criminal legal aid services to young offenders should be similarly structured to that described above for adult offenders, but there should be local recognition and accommodation in the design of the range of services offered to reflect the special issues arising in regard to youth and children who become involved in the criminal justice system.
- (b) Lawyers working with youth should be knowledgeable in the area of *Young Offenders Act* proceedings and related community services, and should meet appropriate performance standards set by the legal aid administration.

- (c) All youth cases should be eligible for duty counsel coverage in accordance with the statutory right to counsel, and those cases determined to be of sufficient complexity to trigger choice of counsel should receive a choice of service-delivery options (as available in their community).

27. Community clinics should not be used to provide criminal law legal aid services directly, except in exceptional circumstances, although criminal Staff Offices should consider co-locating with, or locating near, community clinics.

28. Where the Area Director makes a determination about whether a case is covered or which delivery model is appropriate, the Area Committee should hear appeals from such determinations. Where there is a decision that it is not appropriate for a client to change his or her counsel, an appeal could also be taken to the Area Committee. Where there is a decision by the Area Director to strike a lawyer off the local legal aid panel, an appeal could be taken to the Provincial Director. The Provincial Director's decision not to authorize an appeal to the Court of Appeal for Ontario or the Supreme Court of Canada would be reviewable by a subcommittee of the governing authority.

29. Charge screening, early Crown disclosure, diversion, and conditional sentencing should be consistently and effectively put into place across the province by the Crown to match the early intake and assessment procedures recommended in relation to the delivery of criminal legal aid services.

CHAPTER 10 FAMILY LAW LEGAL AID SERVICES

30. Legal aid administrators should implement a flexible and locally responsive model for the delivery of family law legal aid services that will allow administrators, service providers, and clients to develop service-delivery options that maximize the volume of high-quality services that can be sustained within a capped budget.

31. The legal aid authority should develop an effective way of assessing prospective family law clients' needs as individuals and of setting priorities among those needs based on the impact of the provision or the withholding of services in the circumstances.

32. Legal aid administrators should diversify the mix of service-delivery models used to provide family law legal aid services in Ontario as follows:

- (a) private judicare lawyers should continue to be a primary provider of services;
- (b) the legal aid system in Ontario should develop a limited number of Staff Offices. These offices should be staffed by lawyers, supervised paralegals, counsellors, and administrative personnel. These offices should be modelled on the full-service pilot approved by the Law Society in 1994. At least one Staff Office should be modelled on the Women's Family Law Centre pilot approved by the Law Society in 1993;
- (c) community clinics should not be used to provide family law legal aid services directly, except in exceptional circumstances, although family Staff Offices should consider co-locating with, or locating near, community clinics;

- (d) the legal aid system should develop an expanded duty counsel program for the delivery of family law services;
- (e) block contracting should not be used as a means to deliver family law legal aid services;
- (f) the use of supervised paralegals in providing family law services should be significantly enhanced, to support and assist the work of private, staff, and duty counsel lawyers, and to perform work which does not require lawyer involvement;
- (g) Area Offices, Staff Offices, and/or expanded duty counsel offices should have more public-education materials available for family law litigants. These materials, prepared in a variety of languages, should be made available at the first point of contact.

33. The legal aid system should provide a special certificate or retainer to address “emergency” family law matters; a sophisticated case-assessment/intake function to assess and address the full range of “non-emergency” legal needs in light of established priorities; a significant summary legal advice program; a case-management program for legal aid services delivered by either private or staff lawyers; and an expanded duty counsel program.

34. The case-assessment/intake function for family law matters should begin when an applicant enters an Area Office (or one of its satellites), with some intake services being available at Staff Offices or duty counsel offices or, in some instances or at some locations, community clinics. These alternative intake offices should be linked electronically to Area Offices in order to provide access or linkages to many of the same functions performed by Area Offices.

35. The structure of service delivery for “emergency” legal assistance in family law cases should be as follows:

- (a) The legal aid system should provide immediate “emergency” legal assistance in instances where a delay in the provision of at least some form of legal assistance could have irreparable, serious consequences for the person involved, or for his or her family. Other legal aid offices, including Staff Offices, duty counsel offices, or community clinics, should be allowed to authorize “emergency” legal assistance in the absence of an accessible Area Office.
- (b) “Emergency” legal aid assistance should be in the form of either an interim “emergency services” certificate or the provision of a limited amount of legal services within a Staff Office or duty counsel office until such time as the individual’s situation has stabilized.
- (c) Individuals who need emergency legal assistance should not normally be subject to a full legal or financial assessment at this stage. Rather, in most cases, the individual should undergo a more complete intake interview and assessment as soon as the situation has been stabilized.

36. In cases judged not to be emergencies (or where the situation has stabilized), each applicant should be subject to a full case-assessment and intake process, including a test for financial eligibility.
37. Applicants who are not financially eligible for legal aid assistance or whose issue does not fall within the legal aid system's services or priorities should be provided with public-education materials, or referral to other agencies or, through the Lawyer Referral Service, to a member of the private bar, as appropriate. Applicants who are diverted to other agencies should be told that they could return to legal aid if and when their matters assumed a legal dimension.
38. Applicants who are financially eligible for legal aid and whose legal matter is covered by the legal aid program should be provided a range of legal services, including representation on a solicitor/client basis by way of either a legal aid certificate or a Staff Office; summary legal advice in the entire range of family law matters; or referrals to duty counsel, depending on their personal legal needs.
39. The number of duty counsel available for family law proceedings should be significantly increased, in the form of a permanent duty counsel office located at either an Area Office or a local courthouse, where financially feasible.
40. The summary advice program should work in conjunction with the expanded duty counsel program in order to assist clients to utilize duty counsel effectively on consent matters and adjournments once they have received summary legal advice or help with court forms. The person providing summary legal advice should assist a client in making an application for more intensive forms of legal assistance, should that assistance prove necessary during the course of providing summary advice.
41. In cases where individual case representation is appropriate, the client should be provided with an initial, limited retainer for either a private or staff lawyer. The client should be allowed to choose whether that retainer is taken to a private or staff lawyer. If a client's case cannot be resolved within the limits of the initial referral, the staff or private lawyer should be authorized to submit an opinion letter outlining the additional services necessary. Upon receipt of the letter, legal aid administrators should determine whether or not to approve further services under a case-management plan.
42. The services provided by private lawyers, staff lawyers, duty counsel, and other staff should be subject to appropriate quality-assurance mechanisms. Standards should be set for lawyers wishing to be on panels to accept legal aid certificates.
43. Family law legal aid services provided by members of the private bar should be supplemented with a number of central supports, including access to dedicated research and other central services, and to client-support facilities in family law Staff Offices. Staff Offices should also develop strong linkages with community and other agencies providing services needed by family law legal aid clients and to other legal aid offices dealing with related issues such as young offender matters.
44. The family law case-management program should be designed to work in conjunction with many existing programs to deliver family law legal aid services, including the

Plan's successful Settlement Conference program and various mediation and other programs, if appropriate.

45. A Family Bar Advisory Committee should be set up in each community, made up of members of the local family bar who will provide assistance to the local Area Director or senior officials within the legal aid authority:
 - (a) advising on guidelines for the Area Director in relation to discretionary decisions;
 - (b) advising on law and procedural reforms; and
 - (c) advising on case-management standards, quality assurance and mentoring programs.
46. Where the Area Director makes a determination about whether a case is covered or which delivery model is appropriate, the Area Committee should hear appeals from such determinations. Where there is a decision that it is not appropriate for a client to change his or her counsel, an appeal could also be taken to the Area Committee. Where there is a decision by the Area Director to strike a lawyer off the local legal aid panel, an appeal could be taken to the Provincial Director. The Provincial Director's decision not to authorize an appeal to the Court of Appeal for Ontario or the Supreme Court of Canada would be reviewable by a subcommittee of the governing authority.

CHAPTER 11 “POVERTY LAW” LEGAL AID SERVICES

47. A revised *Legal Aid Act* should include an explicit mandate to provide “poverty law” services.
48. The community clinic model should be retained as the primary means of delivering “poverty law” services in the province.
49. The independent community board of directors model for individual clinics should be retained.
50. The legal aid authority should make training of community-clinic board members a high priority.
51. The unit of the legal aid authority responsible for clinics should develop infrastructures designed to support community boards, including assistance in the areas of fiscal management, labour relations, conflict resolution, and technical support. This unit should facilitate the development of board “best practices”, mentoring opportunities, access to experts, and improved communication between community boards.
52. The clinic system’s “Quality Assurance Program” should be pursued vigorously. The clinic system should continue its current efforts to regularize data collection across the province.
53. Individual clinics and the overall clinic system should initiate a multiyear strategic-planning process. This process should include an assessment of the current and likely future demand for “poverty” law services; an evaluation of the strengths and

weaknesses of the system to meet that demand; the development of programs or strategies designed to create or improve the coordination of services and skills within the system; and the development of performance measures against which the achievement of those objectives can be assessed.

54. The Executive Director of each individual clinic should sit on the Area Committee of the administrative unit of the legal aid authority in his or her area. The Area Director, or his or her designate, of each administrative area within the legal aid authority should be a member of the board of directors of the clinic in his or her area.
55. As a general rule, the general service clinics should not have a mandate to provide direct case representation in criminal, family, or immigration and refugee law matters. However,
 - (i) such clinics should be allowed to provide other kinds of services in these areas where such services are consistent with their “poverty law” mandate and appropriate safeguards are in place to ensure that these services do not overwhelm the clinic’s “poverty law” services, and
 - (ii) they should be allowed to deliver limited case-representation services in exceptional circumstances (including geographic remoteness and/or lack of other available service providers) if such services are assessed as a community priority.
56. Specialty clinics could and should provide services (including case representation) in these areas if such services would support their focus on systemic issues or would support their client community.
57. The legal aid authority should make the completion of the geographic coverage of the general service clinic system a key priority. The legal aid authority should consult with current clinics, community groups, service providers, and interested individuals in order to determine the need for any new specialty clinics.

CHAPTER 12 IMMIGRATION AND REFUGEE LAW LEGAL AID SERVICES

58. The legal aid authority should establish a needs-assessment and priority-setting process for application by local decision-makers, and an appeals process, in relation to refugee and immigration matters in accordance with the principles set out in this report.
59. With respect to the issuance of legal aid certificates for refugee determinations, the legal aid authority should consider whether the current process of screening claimants to determine whether family members could finance legal representation is cost-justified. Similarly, the issuance of “opinion certificates” to enable counsel to draft a letter to the Plan explaining the merits of the case rather than full certificates should be reviewed to determine whether this is cost effective.
60. In the event of a negative refugee determination, the legal aid administrators should consider modestly expanding the initial “opinion letter” for funding for judicial review and permit: (a) an opinion letter on judicial review; and/or (b) application for

consideration under the Post-Determination Refugee Claimants in Canada (PDRCC) program; and/or (c) application for humanitarian and compassionate consideration.

61. The legal aid system should provide legal aid services for detainees, at least with respect to an initial detention review, through the Refugee Law Office.
62. With respect to deportation proceedings, legal aid should resume screening applicants with a view to funding financially eligible applicants who have been in Canada since childhood or adolescence, and have little connection to their country of citizenship if this qualifies as an overall priority for the legal aid system. Similarly, legal aid certificates for preparation of certificate of “public danger” submissions to the Minister of Citizenship and Immigration should be considered for a limited number of hours to those for whom the consequences of removal are the most serious (refugees and those who have been in Canada since their youth).
63. The legal aid authority should consider whether there are cost savings to be realized from contracting-out blocks of cases from the same country or region to lawyers or law firms for a pre-set fee (to be determined in consultation with the bar), and allow counsel to tender based on quality-assurance commitments.
64. The legal aid authority should adopt a range of quality control strategies, including: (a) information vehicles explaining to claimants how legal aid works, what clients are entitled to expect from lawyers, and providing a number/contact person to whom complaints/questions can be directed; (b) formulating standards of conduct for the practice of immigration/refugee lawyers; (c) coordinating investigation and disciplinary efforts.
65. The mandate of the Refugee Law Office, established as a pilot project in 1994, should be substantially extended to include not only refugee determinations, but detention reviews, deportation proceedings, applications for consideration under the Post-Determination Refugee Claimants in Canada program, applications for humanitarian and compassionate consideration, and certificates of “public danger” submissions. In addition, all initial screening for legal aid certificates in immigration and refugee matters in Toronto should be undertaken by the Refugee Law Office (renamed the Immigration Law Office), with successful applicants for legal aid then having the choice of using the services of the RLO (ILO) or private counsel.

CHAPTER 13 “OTHER” CIVIL LAW LEGAL AID SERVICES

66. The Ontario government should introduce legislation that allows for regulated contingent-fee arrangements for lawyers in Ontario.
67. The legal aid authority should coordinate efforts with its justice-system partners to establish a Contingency Legal Aid Fund for low-income Ontarians.
68. The legal aid authority should revisit the range of civil cases that historically had coverage under the Plan, and should reassess whether or not coverage should be provided to people in some or all of the matters in light of our articulated priority-setting considerations and managed-intake proposals.

CHAPTER 14 FUNDING AND FINANCIAL ARRANGEMENTS

69. Assuming that the legal aid system in Ontario is to meet fixed funding commitments, the *Legal Aid Act* should be amended to reflect this arrangement.
70. The provincial government should provide the legal aid authority with a rolling, three-year funding allocation. The legal aid authority should be allowed to carry surpluses and deficits within the three-year cycle (and, with the Attorney General's approval, between cycles).
71. As a condition of funding, the legal aid authority should provide the provincial government with annual reports, annual business plans, and a multiyear strategic plan.
72. The *Legal Aid Act* should, at a minimum, guarantee the current level of funding for the clinic program's current mandate for a period of at least three years after the expiry of the MOU.
73. The legal aid authority should make the development of a sophisticated management-information and information-technology strategy an early priority. This strategy should seek to:
 - (i) increase operational and financial controls;
 - (ii) reduce administrative costs;
 - (iii) enhance program-evaluation capabilities; and
 - (iv) improve the quality of service to clients and service providers, potentially including improvements in access, electronic reporting of work done, direct deposit to service providers' bank accounts, electronic reporting of payments for work done, and outstanding work-in-progress and work yet to be done.
74. The legal aid authority should continue its client-contribution policy based on assessed ability to pay.
75. The legal aid authority should improve its ability to recover client contributions and costs, including improved collection on Pay Agreements and lien proceeds, should it prove cost-effective to do so.
76. The legal aid authority and the provincial government should approach the federal government in order to:
 - (i) urge the federal government to maintain or increase the present level of federal funding to legal aid;
 - (ii) identify federal laws, procedures, or policies which affect the demand for legal aid and access to justice in furtherance of the authority's responsibility to undertake ongoing research and develop strategies to implement law and procedures which encourage access to justice and an efficient, integrated justice system; and
 - (iii) seek funding for one or more of the innovative projects discussed in this report.

77. The prevailing level of funding for legal aid services in Ontario should continue past the expiry of the MOU.
78. The provincial government should establish a separate budget allocation for the purpose of funding one-time “transition” costs, including the appointment of a transitional board, and improved information technology, which funds will be required in the 1998/99 fiscal year.

CHAPTER 15 GOVERNANCE

79. Governance of the legal aid system in Ontario should be transferred from the Law Society to an independent statutory agency.
80. The government should play a critical role in the appointment of the members of the agency and should assume political responsibility for the definition of its mandate. Once the government has established an agency in which it can have confidence and has defined its mandate, however, the government should, in the normal course of events, allow the agency to proceed with the job assigned to it.
81. The mandate of the new agency should specifically indicate that it is to provide appropriate legal aid services across a broad range of service areas, such as criminal law, family law, immigration and refugee law, and “poverty law”. The mandate of the new agency should be stated in an authoritative fashion, preferably in the enabling legislation for the agency.
82. The agency should be designed in such a way as to ensure that it has the capacity to carry out the commitments assigned to it in the new vision for legal aid in Ontario, set out in chapter 8.
83. The board of the agency should be constituted in the following manner:
 - The board should have eleven members. The members should be appointed to the board by the Lieutenant Governor-in-Council, upon the advice of the Attorney General.
 - Of the eleven members, four should be nominated by the Attorney General from a list of ten provided by the Law Society, two of whom must be lawyers who have a significant connection with the clinic system, it being envisaged that at least one of lawyers selected by the Attorney General from the Law Society slate would have extensive knowledge and understanding of the clinic system. The lawyers recommended by the Law Society need not be Benchers. Consideration should be given to requiring the Treasurer of the Law Society to consult with the Chief Justice of Ontario with respect to the identity of the Law Society nominees.
 - The chief executive officer of the agency should sit on the board as a full voting member. In other respects, the Attorney General should be accorded reasonable latitude in selecting candidates for the board in order to achieve as sound a balance as possible of the various groups with a claim to be represented on the board.
 - The legislation establishing the agency should provide that the Attorney General, in appointing persons to be members of the board, shall have regard to the desirability of ensuring that the board includes persons having expertise in or knowledge of :

- (a) the provision of legal services;
- (b) the work of the courts and tribunals;
- (c) management; and
- (d) the legal needs of low-income Ontarians.

84. Members of the agency board should be appointed for three- or four-year terms on a staggered basis. Individual members would be eligible for consideration for a further term.

85. The regular members of the board should be part-time members, as could the chair and vice-chair.

86. The chair and vice-chair of the Board should be appointed by the Attorney General after consultation with the Treasurer of the Law Society. The chair and vice-chair should have longer terms of office than regular members.

87. The responsibilities of the board should be as follows:

- Within the agency's mandate, the board should be responsible for policy-making and strategic planning, and conducting these activities in a manner which is transparent to the Ministry of the Attorney General and the public at large.
- The board would be responsible for formulating cyclical strategic plans which would set the overall objectives for the legal aid system by assessing current and future needs for services, developing strategies to meet those needs, and setting performance measures against which it can be determined whether the achievement of these objectives has been met.
- The board would determine service priorities and allocate resources in accord with those priority determinations.
- The board would be responsible for financial management and budgetary planning.
- The board would formulate requests for provincial funding, which would be forwarded to the Attorney General, and act as an advocate for appropriate levels of funding.
- The board would be responsible for all expenditures of public funds and comply with government requirements concerning reports and audits.
- The board would be responsible for and accountable for the management of the agency and the operation of the service-delivery system.
- The board would develop programs designed to ensure cost-effectiveness of service delivery, quality assurance, and responsiveness to client needs.
- The board would establish a research, program-evaluation, and policy function.
- The board would determine the management and organizational structure for the agency.
- The board would develop human-resources planning and play a direct role in the hiring of senior management.

- The board would develop the agency's capacity to participate in the development of an integrated justice system in collaboration with other partners in the justice system.
- The board would assume responsibility for developing a management information and information-technology strategy for the agency.

88. The name of the agency should be the Legal Services Corporation of Ontario.

89. A number of tentative suggestions concerning the organizational structure of the new agency are offered. We suggest the creation of a separate reporting line for the clinic system which would report to senior management at the same level as the other three functional groups, operations, corporate services and a new program-evaluation and planning function. To signal the increased emphasis on comprehensive management of the system, the title Area Director should be replaced by Area Manager. We suggest that the organizational structure be relatively flat and, more particularly, not include the insertion of a regional level of management of the legal aid system. With respect to the latter point, however, we recommend that one of the Area Managers within each region of the province be identified as the Regional Senior Area Manager for purposes of carrying out coordination of activities within the region.

90. Although we favour continuation of the current role performed by local Area Directors, the number of Area Managers could be reduced by assigning to some the responsibility for more than one community in their particular region of the province, provided that reducing the number of Area Managers in this way would effect significant cost-savings for the legal aid system.

91. There should be a local cyclical strategic-planning exercise parallel to the process carried out at system-wide level. Local strategic plans would inform and be informed by the system-wide process and would be subject to agency approval.

CHAPTER 16 AN IMPLEMENTATION STRATEGY

92. The proposals set forth in this report should be implemented in three phases, the details of which are outlined in chapter 16. Summarized briefly, our proposals should be implemented as follows:

- (a) The first phase, from receipt of this report to enactment of legislation, would involve a policy-development and legislative drafting process within the Ministry of the Attorney General. At the same time, the Ministry should begin to identify people to serve on the board of the Legal Services Corporation of Ontario and should enter into negotiations with the Law Society concerning the framework for a smooth transition to the new legal aid system.
- (b) The second phase, from enactment to expiry of the Memorandum of Understanding in March of 1999, would involve the establishment of the board of the Legal Services Corporation and the development and implementation of a comprehensive transition plan which will ensure a seamless transition for the clients, lawyers and other service providers of the legal aid system and establish appropriate structures to enable the new agency to assume its responsibilities in March of 1999.

- (c) The third phase, post-March 1999, would be the assumption by the Legal Services Corporation of Ontario of responsibility for discharging its statutory mandate and the implementation of its strategy for providing a needs-focused, high quality, prioritized, and cost-effective legal aid service that will be designed to meet the broad range of legal needs of low-income Ontarians.

APPENDIX A

SUMMARY OF SUBMISSIONS

It was the view of both the government and the members of the Legal Aid Review that the task of examining legal aid programs in Ontario could not successfully be accomplished without receiving and considering the input of the widest possible range of groups and constituencies that had both an interest in and knowledge of legal aid services in Ontario. To this end, a public consultation paper was circulated across the province in January 1997 to focus and facilitate submissions by community groups, members of the legal profession, community legal clinics, consumers of legal aid, Plan administrators, and other interested persons.

The consultation paper provided a brief outline of the current legal aid system and asked the reader to consider a number of questions relating to the Review's Terms of Reference: What are the needs people have for legal aid in Ontario? What should be the objectives of the legal aid system? How should priorities be set among the needs of persons with low incomes requiring legal aid? What are the economic, professional, and other incentives associated with various delivery models for service? Who should financially be eligible for legal aid? What has been the impact of the reductions in legal aid? Who should be responsible for funding legal aid? What changes could be made in the larger justice system to enhance the delivery of legal services to low-income people? What management, administrative or technological improvements could be implemented in order to deliver services more effectively or efficiently? Who should govern legal aid?

Despite the short deadline, the consultation paper elicited a strong response. Approximately one hundred and seventy written submissions were received by the Review providing detailed and thoughtful commentary on the issues involving the delivery of legal aid services in Ontario and the clients who are in need of them.

Many lawyers and legal associations responded from across the province. The list of respondents included the L'Association des juristes d'expression française de l'Ontario (AJEFO), the Canadian Association of Black Lawyers, the Canadian Bar Association-Ontario (CBAO), the Family Lawyers Association, the Criminal Lawyers' Association, and the Refugee Lawyers Association. As well as outlining the kinds of services that clients require and describing the effects that the current cuts are having on the delivery of these services, they also offered suggestions about how legal aid could be run more effectively for all of the various stakeholders involved. Judges, tribunal officers, lawyers representing various government ministries and agencies, the Law Society of Upper Canada, and legal aid administrators also responded, often raising many of the same issues and concerns as their colleagues in the private bar.

Community legal clinics and student legal aid societies from across the province responded, providing detailed accounts of the services they provide and identifying the legal needs of the low-income Ontarians that they serve. The specialty clinics also responded, providing important information about the particular needs of the groups with whom they work: for example, the African-Canadian community, the Chinese and Southeast Asian community, the Aboriginal community, the disabled community, injured workers, the elderly,

youth, and the HIV/AIDS community. As well, the clinic system's views were also represented in a general submission, a submission from the Clinic Funding Committee and in a submission by the Ontario Public Service Employees Union on behalf of the clinic staff organized by them.

Many submissions were received from social service agencies who articulated their clients' pressing needs for both legal information and for legal services. They outlined the kinds of services required by their various communities and the importance of these services to the fundamental well being of both their clients and to society at large. These agencies and associations included the Ontario division of the Canadian Mental Health Association, The Family Service Association of Metropolitan Toronto, the Thunder Bay Indian Friendship Centre, the National Action Committee on the Status of Women, the Ontario Association of Interval and Transition Houses, the John Howard Society of Ontario, and The Lakehead Social Planning Council. Individual clients also expressed their views about the services that they received and the problems that they encountered.

Following the outline of our consultation paper, this appendix summarizes many of the ideas set out in the written submissions sent to the Review for its consideration. While it tries to capture the breadth of the views put forward by the many constituencies that responded, it does not purport to list every comment, concern or suggestion received.¹ Comments have been organized using the following categories of respondent:

1. members of the private bar;
2. other members of the legal profession including judges, legal associations, the Law Society, and tribunal and government lawyers;
3. community legal clinics, student law societies, and specialty clinics;
4. community-based agencies, social action groups, and members of the public; and
5. administrators of the Ontario Legal Aid Plan.

1. MEMBERS OF THE PRIVATE BAR

Lawyers from across the province who responded ranged in experience from very senior members of the bar to newly minted calls. Many practised in small firms and some were sole practitioners. Usually, a lawyer had either a criminal or family practice and would confine their remarks to the kinds of work that they did on a regular basis.

(a) Client Needs

There was general agreement that many more client needs exist than are presently being covered by the Plan. Most respondents identified the pressing needs in the areas of criminal and family law. Some submissions, however, strongly argued that needs for legal services were broad and covered a wide range of areas. Further, these needs were often overlapping and often involved daily crises requiring only summary advice or limited interventions. Refugees, the elderly, children and those suffering from mental disabilities were identified as

¹ For a list of the individuals and organizations that made submissions to the Review, see Appendix B of this report.

having special needs. One submission argued that too many lawyers are engaged in competing for Plan resources deflecting attention from a much needed assessment of the current system and the needs of our communities as a whole.

(b) The Goals of the Legal Aid System

There was general agreement that the Plan should be providing legal representation to people who are unable to afford their own lawyers. There were differences expressed as to whether legal aid was a general social right or whether the service should only be provided in the most serious criminal and family law matters. There was concern expressed that without the adequate provision of legal aid, *Charter* rights would not be meaningfully observed, that the justice system would become undemocratic, and that economic strictures would erode the justice system to create a two or three tiered justice system. Further, legal aid's goal should also be to provide quality representation in order that the same degree of access to justice exists for everyone.

(c) Coverage

Most submissions argued for a priority in family and criminal coverage: family because of its fundamental importance as a social institution, and criminal because of the liberty interest. All submissions argued that allowable hours and tariff levels are too low, especially in the area of family law.

(d) Delivery Models

While supporting a mixed delivery system, most members of the private bar strongly urged the continuance of the certificate program especially in the areas of family, criminal, and refugee law. The advantages of judicare identified in the submissions included quality control, efficient, economic, responsive and flexible delivery, continuity of representation, independence of representation, the development of professional expertise, and client choice. While choice of counsel was considered an important issue by most lawyers, several respondents disagreed, arguing that choice of counsel does not really exist because of the reduced numbers of lawyers who accept legal aid. Moreover, clients, left to making their own choices about legal representation, often make a wrong or uninformed choice. Concerns were raised about duty counsel, their workload, and the limited nature of their contact with clients. Lawyers also submitted that any staff models set up in the area of criminal law should be funded on a comparable basis to that provided to the Crown Attorneys, and that these offices would be vulnerable to government underfunding.

(e) Financing and Financial Eligibility

In terms of financing legal aid, most respondents argued that the largest funders should be the federal and provincial governments. Fine revenue, client contribution, application fees, low interest loans, lottery and gambling proceeds, and the Law Foundation were also identified as additional sources of revenue. One respondent suggested issuing tax receipts for *pro bono* work through a non-profit corporation set up for this purpose. Respondents were of mixed views on the continuation of the lawyer levy.

Most submissions argued that eligibility should be expanded to include the working poor and that clients should be permitted to contribute to fees. Debt loads and dependants should be factored into the criteria. Most submissions argued that eligibility against set financial criteria and not the type of legal issue presented should determine coverage.

(f) The Impact of the Recent Constraints

Most respondents pointed out that the cuts to legal aid have created a host of problems for all involved: the justice system, the service providers and the clients. Many submissions identified the following issues: fewer lawyers and fewer senior lawyers taking legal aid; backlogged courts; inadequate preparation time; increased numbers of convictions and incarcerations; many more unrepresented individuals in an increasingly serious array of matters; the failure of many of these individuals to understand the consequences of the agreements into which they enter; the fact that the Crown is indirectly controlling who gets legal aid through charge screening procedures; overworked duty counsel; and restrictions on the ability to mount a complete defence.

Several submissions argued that both court costs and social costs are being created and exacerbated because of the failure to properly fund legal aid. For example, whole segments of the population are being precluded from asserting their legal remedies in the area of employment law. Poor clients are left to deal with the difficult task of asserting their rights in complicated legal proceedings when they may lack literacy or have a disability that will preclude their success from the outset. One submission emphasized that there are greatly diminished professional incentives, especially for the younger members of the legal profession, to develop criminal, family or “poverty law” practices.

(g) Operations and Management

Generally, respondents felt that the Plan needed to control and monitor operational issues better: improved computerization; less red tape; better informed Area Directors; faster response time on authorizations; more consultation with the profession with respect to instituting operational changes; a merged clinic and certificate administration to provide clients with one-stop shopping; better regulation of who actually does the client work; and more effort in the area of monetary recoveries.

(h) Legal Aid as Part of the Larger Justice System

Many lawyers offered suggestions about how various components of the larger justice system could be changed to provide savings to legal aid administration. In the area of family law, lawyers suggested expanding the Unified Family Court, and increasing the use of mediation; coordinating efforts between government agencies so child support, for example, is not sought where a parent is not in a position to pay it; developing more guidelines as in the case of child support. In the area of criminal law, one submission argued that by fully funding the operation of the Plan, savings will result from quicker trials, fewer incarcerations and the reduced risks and expenditures of wrongful convictions. Lawyers emphasized the need for better charging protocols, more diversion, and more police discretion. Some submissions identified the need for more court rooms and judges. One submission argued that government initiatives in the areas of, for example, spousal assault and drunk driving, have an impact on the cost of delivering legal aid services. Another lawyer suggested that by increasing the numbers of test cases and class actions, more people can have their legal problems addressed with greater efficiency.

(i) Governance

Several submissions supported the Law Society’s continued administration of legal aid arguing that it ensures both independence and lawyer participation. One submission described

the situation of the Neighbourhood Legal Services Corporation in the U.S., reflecting the concern that if the profession loses control, the Plan will become just another underfunded social program. Other submissions argued that the Law Society was neither designed nor qualified to manage such a large operation as legal aid. All respondents expressed the need for the Plan to be independent of government.

2. OTHER MEMBERS OF THE LEGAL PROFESSION — JUDGES, LEGAL ASSOCIATIONS, THE LAW SOCIETY, AND TRIBUNAL AND GOVERNMENT LAWYERS

A wide variety of members of the legal profession responded who were not engaged in private practice. Many of their concerns centred on the effects that the cutbacks to legal aid were having on the administration of justice. Also, many legal associations represented the concerns of their members and the particular client groups served by them.

(a) Client Needs

In their submission to the Review, the Ontario Family Law Judges Association and the Ontario Judges Association observed that many clients who cannot afford lawyers have serious legal problems which require urgent resolution. In this regard, clients have “a right to expect access” which, according to the judges, means understanding rights and remedies, being able to articulate needs and the basis for entitlement, and being able to navigate through a complex legal system. In the judges’ view, legal aid is required in the criminal and family law contexts to ensure that low-income and indigent persons receive competent, consistent, and accountable legal representation appropriate to the needs of their case.

Consistent with this view, the Ontario Association of Children’s Aid Societies and the Legal Services Branch of the Ministry of Community and Social Services argued that many of the people who come within their jurisdictions cannot afford legal representation, yet it is needed to deal with young offender issues, support applications, appeals with respect to social assistance matters, and child protection issues. From the perspective of the Workers’ Compensation Appeals Tribunal, the need for legal aid is nowhere more apparent than in the workings of the administrative justice system because issues in administrative law provide and enforce the rights of many who live in poverty and who may lack the information and confidence to pursue them.

The Family Lawyers Association identified urgent needs in the area of family law, especially in the areas of safety, support, and child apprehension. Litigation, as well as mediation, negotiation, and referrals need to be covered by the Plan. For the Family Lawyers Association, the adversarial system depends upon both sides being effectively represented. In asserting the importance of coverage in the area of criminal law, the Criminal Lawyers’ Association identified the uniqueness of a criminal proceeding and the fact that many accused are socially and economically disadvantaged. They also submitted that there were needs for a broad range of coverage that included the need for translation and transportation services. Further, Native Canadians had particular legal service needs. According to the CBAO, there is insufficient information at present to quantify the effects of decisions taken to limit the availability of legal services and that more efforts must be made to collect the data necessary to make considered decisions about the future of legal aid funding in Ontario.

(b) The Goals of the Legal Aid System

For justice to be truly accessible, the CBAO submitted that there must be provision of legal services to those citizens who cannot afford them and the services must be of comparable quality to those obtained by those able to privately retain counsel. As outlined in their submission to the Review, the Ontario Family Law Judges Association and the Ontario Judges Association argued that it would be wrong to view legal aid as exclusively a social program. Rather, the Plan is a fundamental and essential component of the administration of justice. The Workers' Compensation Appeals Tribunal submitted that legal aid is not about compensating lawyers, but rather about giving substance to rights and ensuring access to justice. According to the Ontario Human Rights Commission, the values of the *Human Rights Code* are applicable to the goals of legal aid and the accessibility of affordable legal services has a significant impact upon the full inclusion of disadvantaged groups into society.

The Defence Counsel Association of Ottawa argued that the goal of the Plan should be to ensure equal access to justice and that its quality should not be dependent on the means of the defendant. The Criminal Lawyers' Association submitted that legal aid should endeavour to maintain as small a gap as possible with respect to the level of service between socio-economic groups. Citing the former Attorney General, Chief Justice Roy McMurtry, the Family Lawyers Association argued that legal aid was an important mechanism for civil liberty, and essential for the understanding and assertion of rights, freedoms, and obligations.

In its brief to the Review entitled "Access to Justice: Legal Aid in Ontario", the Law Society argued that the changes to the funding of legal aid has transformed it from a service oriented system with an emphasis on access to justice and the ideals of legal services as a matter of human rights, democratic principle and common decency, to one which struggles to provide service in an atmosphere focused on cost containment above all. They noted that in 1994, the Federation of Law Societies of Canada reaffirmed the commitment of all law societies in Canada to legal aid and to a core set of general principles with respect to its objectives. They also noted that the Law Society itself has reaffirmed the importance of the social justice rationale for legal aid, rejecting the view that it should be conducted primarily or largely as a charity.

(c) Coverage

The Ontario Family Law Judges Association and the Ontario Judges Association strongly supported coverage in the area of criminal and family law because subsidized legal services have an important role to play in both maintaining respect for family law judgements, and bringing balance to the field between the resources of the Crown and the defence. In many submissions, the needs of children and young people were also emphasized as a concern. The Children's Aid Society, for example, asserted that coverage priorities should exist in cases of parental rights and children's safety. The Criminal Lawyers' Association argued that bail is an important coverage area as serious consequences flow from not having representation at this stage of the proceeding. The CBAO highlighted coverage in the area of refugee law because of the particular vulnerability of this client group.

(d) Delivery Models

Criminal and family lawyer associations from across the province argued that the judicare model is optimal for providing quality legal services to family and criminal law clients for reasons that include: choice of counsel; flexible and adaptable delivery; quality control; cost

effectiveness; client trust. Further, it was argued that clinic, staff or public defender delivery models would result in prohibitive start up costs and create the perception of inferior service. The Criminal Lawyers' Association of Ottawa also argued that it would be unfair to the thousands of people who rely on judicare for part of their income to move to an unproven staff model. The CBAO similarly supported judicare for criminal and family law service delivery. The Refugee Lawyers' Association supported a mixed delivery system and argued that clinics played an important role in matters not covered by certificates. The Workers' Compensation Appeals Tribunal submitted that while many lay advocates do competent work, the need for better regulation of them remains a live issue.

(e) Financing and Financial Eligibility

The CBAO suggested that programs, akin to student loans, should be instituted for legal aid and that clients should be allowed to top up fees and contribute to disbursements. The Criminal Lawyers' Association suggested that legal aid should seek charitable tax status so that donations to the Plan could be deductible. Liens should be allowed on GST and tax refunds, and proceeds from police seizures could be a source of revenue for the Plan. In terms of eligibility, the Family Lawyers Association argued that more creativity was needed in order to expand eligibility through, for example, loan agreements. The Criminal Lawyers' Association suggested that the Plan should consider expanding eligibility for employed persons who lack the resources for representation. The Plan, however, needs to do a better job of monitoring continuing financial eligibility.

(f) The Impact of the Recent Constraints

In its submission to the Review, the Law Society noted the developing schism in the justice system between those with ample means and those without, and it described a growing crisis with respect to the accessibility of the justice system for persons of modest means. What is at stake, in the Law Society's view, is the restoration of the promise of justice to those of modest means in Ontario through a demonstrated financial commitment to service on the part of government. In the context of explaining their own role in managing the Plan in the face of reduced funding, the Law Society stated simply, "the operation has been a success but the patient is near death".

In their submission to the Review, the Ontario Family Law Judges Association and the Ontario Judges Association discussed at length the effects the cuts to legal aid were having on the administration of justice in courts across the province. In sum, the judges assert that the cuts have negatively impacted on the quality of justice being meted out in today's courts as significantly more unrepresented litigants attempt to navigate a system that has not been designed for this. In particular, the judges noted the following: increased workloads for duty counsel; more judges assuming the role of "lion tamer" or inquisitor; increases in the numbers of incomplete or improperly drafted pleadings; longer trials; more adjournments; the creation of circumstances where "questionable guilty pleas" are being entered; incarcerations where, formerly, people would have been released.

The CBAO argued that the growth of un- and under-represented clients is consuming resources that impose significant costs on the larger justice system. For example, lawyers who do child protection work note that fewer of their applications are proceeding because litigants cannot get representation. The Family Lawyers Association posits that people are staying in unhealthy or destructive situations because of the unavailability of legal aid, or, as the Essex

Family Law Association argues, people may begin to take the dangerous turn to self-help if their situations remain unremedied. Further, the efficiencies of case management or pre-trials cannot be realized without representation.

As the Ontario Judges Association noted, it is clear that the growth of unrepresented litigants has meant that the private bar has not filled the void left by the decrease in the number of certificates issued. As the Canadian Association of Black Lawyers argues, this means that deserving cases are not being advanced and the legal issues of the poor, working poor and even the middle classes are not being addressed. Further, when a lawyer loses his or her legal aid practice, the Kenora Law Association argues that the ability to do community or *pro bono* work, or to act for reduced retainers as in the case of Children's Lawyer matters, is similarly curtailed. This occurs, in part, because the loss of the income from legal aid affects the way the rest of the practice is built.

(g) Operations and Management

The Criminal Lawyers' Association indicated that daily billing limits and the six month billing rule were appropriate and that for greater efficiency, legal aid offices should be housed in court houses around the province.

(h) Legal Aid As Part of the Larger Justice System

The Family Court Judges noted that there are a collection of new statutes and legal issues that have emerged since the days before legal aid. Further, there are new expectations that the Bench will deal with the demands placed on them by society to address pressing social issues like sexual abuse and spousal assault. The need for legal aid, then, must be considered in this context.

In the area of criminal law, the Criminal Lawyers' Association argued that public attitudes and the way in which police charge have an impact on legal aid. They suggest the following measures be instituted to render more efficient and cost effective criminal litigation: pre-trials by phone; service by fax; disclosure by mail; charge screening by experienced prosecutors; young offender charge screening; and consistent application of diversion and alternative measures. The Criminal Lawyers' Association (London) submits that local sentencing tariffs should be developed, daily guilty plea courts should be instituted, and that absolute and conditional discharges should be granted more often, where appropriate.

(i) Governance

While arguing that the Plan needs more community involvement, the Canadian Association of Black Lawyers submitted that the Law Society is well placed to govern the Plan and that an independent agency would be vulnerable to changing government priorities. AJEFO argued that the Plan should be independent of both the bar and government. The Criminal Lawyers' Association argued that scarce resources are pitting lawyers against each other. This would be remedied by the creation of an independent agency to allocate funds and create policy in conjunction with government, service providers, and the Law Society. It was of the utmost importance to the Criminal Lawyers' Association, however, that the Ministry of the Attorney General play no role in the management of criminal legal aid.

In its submission to the Review on the issue of governance, the Law Society emphasized their independence from both government and the profession. Whether administration

remained with the Law Society was a question tied to whether Plan funding would permit the Law Society to again deliver an adequate range and level of service, which has been drastically eroded over the past three years.

3. COMMUNITY LEGAL CLINICS, STUDENT LAW SOCIETIES, SPECIALTY CLINICS

Over forty clinics from across the province submitted written briefs to the Review. They outlined the distinct role that they play in the delivery of subsidized legal services in Ontario. While supportive of the role of the certificate side of the program, clinics argued that their model was both effective and cost efficient for the delivery of poverty law services in Ontario.

(a) Client Needs

Many clinic submissions argued that low-income Ontarians had both legal needs in the traditional sense and distinct and particular legal needs that related to their poverty and the highly regulated nature of their lives. Thus, a broad approach had to be taken in addressing these needs in order that consumers and communities could identify their needs in a changing environment. Further, the legal needs of low-income people were often intersecting and went beyond the need for traditional advocacy and representation services.

Submissions identified many areas of law as being of great significance to low-income people. They included landlord and tenant, income maintenance, Canada pensions, workers' compensation, employment insurance, human rights, employment standards, occupational health and safety, consumer, estates, criminal, family, immigration and refugee, and health law. Needs were also identified in other areas of law that have an impact on the lives of low-income people; for example, patient rights, mental health, police complaints, and child protection. Also, many submissions asserted that clients generally needed a more thorough understanding of their rights and had pressing needs for legal information.

Many submissions argued that the causes of poverty exacerbated people's legal problems such as illiteracy, youth, discrimination, mental illness, or language and cultural barriers. Further, different groups of low-income people had different needs for legal services. Several submissions pointed out that many of the problems faced by poor people involved daily crises of survival that required a range of service responses including advocacy, negotiation, referral, test case litigation, law reform, research, and self-help.

(b) The Goals of the Legal Aid System

Many clinic submissions took a systemic view with respect to articulating the goals of the Plan. For example, many submissions identified the elimination of poverty as being one of the fundamental objectives of providing subsidized legal services to the poor. Other submissions argued that the plan was not simply a tool for matching clients with lawyers to solve problems in strictly legal ways and that it had a role to play in ensuring that the justice system, itself, was not used to perpetuate inequality and disadvantage.

For claims of equality and justice to have substance, some submissions argued that the goal of the legal aid system should be to provide low-income people with access to the legislative and judicial processes affecting them. More generally, some submissions identified the goal of the Plan as providing quality legal services to low-income people in the areas of law that significantly affect their lives.

(c) Coverage

Clinic submissions indicated that the community-based board model was an effective and accountable way to prioritize coverage. Many argued that the prioritization of needs should encompass a wide range of services and issues extending beyond traditional legal values. Further, the wide range of legal services set out in the Clinic Funding Regulation needed to be preserved.

Needs that were fundamental to health and survival were generally given greatest priority. They included issues related to shelter, income maintenance, employment, education, liberty, the parent/child relationship, and equality.

(d) Delivery Models

Clinic submissions argued that the community clinic model was highly effective for the delivery of poverty law services. As one submission put it, clinics are the best model of delivery for addressing the “crisis of hunger and homelessness.” The strengths of the clinic model included their location in low-income communities, community-board direction, the networking of diverse expertise, and the multi-service approach to delivery and problem-solving. Specialty clinics served the important function of providing specific low-income communities with points of access into the justice system and addressing the needs of particular groups in more systemic ways. Specialty clinics also functioned to provide specialized legal information to other clinics and, more generally, to members of the legal profession as a whole.

Some submissions argued that the model for delivery had to be matched with the legal need being served. While supporting the work of the certificate side, some submissions expressed the concern that any restructuring should not be done at the expense of damaging the fundamental structures of the clinic side of the program. Further, clinics were generally opposed to expanding their mandates to include family and criminal service delivery, believing that these needs would overwhelm their poverty law mandate. Submissions from Aboriginal Legal Services Toronto, however, argued that an expansion of their clinic mandate was necessary in order to provide their constituency with family, criminal, and poverty law services in a way more appropriate for their particular clients’ needs.

(e) Financing and Financial Eligibility

Clinics agreed that the financing of legal aid should be a government responsibility, with some clinics arguing that the federal government should assume a greater share. Suggestions for enhancing revenue and services included revisiting the concept of *pro bono publico*, increasing of the levy on lawyers who did not participate in the Plan, and amending legislation so that in certain cases there would be the mandatory appointment of counsel.

Many clinic submissions expressed concern for the working poor and middle classes for whom legal services were too expensive. Contingency fees, repayment plans, and higher income cut-offs were cited as ways to increase access to legal aid. Submissions argued that more flexibility had to be exercised when considering applications for legal aid. For example, parental income should not be considered in assessing an application, and medical expenses should be deducted from income. The \$25 application fee was consistently identified as being a significant barrier for low-income people in need of legal assistance.

(f) The Impact of the Recent Constraints

Many clinics noted in their submissions that the cutbacks in legal aid have been accompanied by other reductions in public services that have exacerbated the problems of low-income people. Clinics universally noted the increasing numbers of people who seek assistance from them. Further, these clients appear to be under greater stress and present a wider array of pressing legal problems. Several submissions also indicated that it has been the most vulnerable in society that have been affected most negatively by the cutbacks in service. As one submission from a student clinic in Toronto noted, the maxim of the clinic has changed from "we will help these people" to "if we don't help these people, who will?"

Clinics are facing increased demands for advice in the area of criminal and family law and see increasing numbers of clients who have no opportunity to obtain any redress for the serious legal issues that confront them in such areas as employment, human rights, and debtor/creditor. Clinics note an increase in the numbers of guilty pleas entered, increases in the numbers of women remaining in and returning to violent situations, increases in the numbers of youth who cannot get social assistance, and decreases in the numbers of lawyers who will take legal aid files.

(g) Operations and Management

Many submissions argued that the clinic system's role required a statutory basis and that it is important to preserve its separateness with respect to the rest of the Plan. Local control by community boards was also considered by many submissions to be of paramount importance. Many submissions also indicated that there was a need for greater communication between the clinic and certificate sides, better use of technology, and better training. In OPSEU's view, central bargaining for the clinics which are unionized would be more efficient.

(h) Legal Aid as Part of the Larger Justice System

Many submissions cited the complexity and adversarial nature of proceedings as having a significant impact on the costs of administering justice. Also, the reductions in service of government and administrative agencies increase costs and delays. Further, the view was taken in many submissions that there is a tremendous social cost to be paid because of the erosion of statutory protections in the areas of employment, landlord and tenant, and income maintenance law.

(i) Governance

While clinics argued that retaining local control was important, many submissions endorsed the role of the Law Society with respect of the administration of the clinic side of the Plan. Some submissions discussed the tension between the independence and "clout" of the Law Society's administration, and the need for more community and consumer control. Independence from government was seen as a crucial element to plan governance.

4. COMMUNITY-BASED AGENCIES, SOCIAL ACTION GROUPS, AND MEMBERS OF THE PUBLIC

Generally, every group, individual, or agency that responded highlighted the needs of their particular constituency. Groups that were community-based, however, tended to view the issues more systemically, seeing the problems with legal aid as part of the larger crisis of

poverty itself, and of access to government services to ameliorate it. Community input to legal aid was seen as an important issue for community-based groups.

(a) Client Needs

Most respondents pointed out that low-income Ontarians have wide ranging legal needs starting with the provision of information relating to their legal rights. Areas of law requiring coverage ranged from the traditional services provided by the criminal, immigration, civil, employment, estate or family bars, to coverage that touched upon the fundamentals of a person's ability to survive, such as housing, income maintenance, health care, and human rights.

In the area of family law, respondents identified the seriousness of domestic violence and the legal needs that flow from it. Other areas identified for coverage included custody and support, the exclusive possession of the matrimonial home, property and pension division. With respect to criminal law coverage, many submissions emphasized that a disproportionate number of accused persons are indigent. The Thunder Bay Indian Friendship Centre submitted that members of their constituency often do not understand the consequences of criminal proceedings and need comprehensive criminal law coverage as a result. In the area of administrative law, many submissions identified the importance of representation in this area for the well-being of their constituents, including Workers' Compensation, Employment Insurance, Canada Pension Plan, Criminal Injuries Compensation Board, pay equity, consumer, environmental and human rights law.

Many submissions argued that different groups had different legal needs and that service delivery must take account of these differences. In the words of the National Action Committee on the Status of Women, treating people fairly and equally does not mean treating everyone in the same way. Different groups who were identified as having distinct legal needs included Aboriginal people, abused women and children, persons with disabilities, persons who live in rural communities, the elderly, children and youth, immigrants and refugees, visible minorities, and francophones. To deliver effective service to these groups, barriers of language, literacy, culture, mental or physical disability, geography, or fear of authority must be overcome.

(b) The Goals of the Legal Aid System

Respondents from the community consistently asserted that there should not be one law for the rich and one law for the poor, and legal aid has an important role to play with respect to this. As was argued in many submissions, legal aid must concern itself with the vulnerable and economically disadvantaged members of society who need to invoke the law in order to protect their rights and assert their entitlements. It must provide legal services in areas fundamental to human necessities and rights. Low-income Ontarians should have the same legal rights and avenues of redress as any other Ontarian because this kind of access is crucial for a harmonious society. In short, legal aid services must ensure justice for all, regardless of the province's economy or an individual's ability to pay.

(c) Coverage

Several submissions, such as that from the National Action Committee on the Status of Women, did not agree to the necessity of capped funding with respect to the delivery of legal aid services arguing that a cap was inappropriate given legal aid's importance to the

administration of justice and to the Rule of Law. Other groups such as Houselink Community Homes and the Canadian Mental Health Association argued that if limited funding required prioritizing, then priorities must be determined around an individual's basic requirements such as liberty, financial stability, and housing. Other submissions identified health care issues, and coverage for people at risk of losing their homes, their children or their employment, as other important areas of coverage. The Ontario Association of Interval and Transition Houses argued that if priorities needed to be set between competing client needs, then a framework for decision-making that supports the objectives and goals of a publicly funded system must be developed to justify these difficult decisions.

Some submissions argued for a priority with respect to liberty issues. The Elizabeth Fry Society urged that comprehensive coverage was needed from initial detention to trial. The John Howard Society emphasized the importance of coverage for those who are incarcerated. Many submissions argued for equal or increased funding in the areas of civil and family law, citing either a deliberate or inadvertent gender bias to existing coverage priorities. Areas of priority coverage in family law included custody, access, support, property and pension division, and issues resulting from domestic violence. Other areas of coverage identified as a priority were wrongful dismissal, *Highway Traffic Act* violations, summary matters under the *Criminal Code*, consumer law, human rights, workers' compensation, employment insurance, and income maintenance issues where lawyer involvement was thought to resolve issues more quickly and effectively.

(d) Delivery Models

Generally, the clinic system was viewed as an important source of service delivery by community groups. Further, community groups and service providers whose mandates fell within those of specialty clinics emphasized the importance that these clinics had for their various client groups. Clinics were viewed as efficient ways to deliver the variety of legal services needed by low-income people and they were seen as important points of access to the justice system.

Community groups also had relatively flexible approaches to service delivery. They argued that models had to be accessible, accountable, confidential, effective, local, and affordable. Some suggested full-service, one-stop service centres. One submission argued that lawyers should be connected to shelters. The Thunder Bay Indian Friendship Centre submitted that more lawyers should be put on salary through the Plan in order to provide clients with consistent and expert service with respect to the various issues that confront the Aboriginal community. Another submission argued that Aboriginal people should operate their own legal aid commissions. While many submissions supported a continuation of the certificate side, especially in the areas of criminal and family law where the issue of client choice was considered important, they also suggested expanding duty counsel, more utilization of paralegals, expanding clinics, and problem-solving in more interdisciplinary ways.

(e) Financing and Financial Eligibility

Many community-based groups argued that application fees were onerous for their constituents and were a significant barrier to access to legal aid services. Many submissions argued that the government should be the primary funder. Other suggested sources of Plan revenue included casino, lottery and fine proceeds, victim surcharge revenue, the Law Foundation, and lawyer contributions from those members who do not work on legal aid files.

One respondent suggested that costs should be sought and awarded to lawyers who secured them on a contingency fee basis.

In terms of eligibility, most community-based groups argued for the expansion of eligibility to encompass, in particular, the needs of the working poor. Repayment schemes and client contributions were often suggested as ways to extend this coverage. There was a general plea to make eligibility guidelines more flexible, in order to address the needs and circumstances of potential applicants. For example, many abused women do not have access to their finances and there are regional differences in the cost of living.

(f) The Impact of the Recent Constraints

Shelters for abused women submitted that the cuts to legal aid have meant that more women are staying in bad or even dangerous situations. They also argued that even if a certificate is granted, lawyers will exhaust a certificate before the more substantive issues can be addressed. Submissions also argued that important societal objectives like the elimination of child poverty or domestic violence are being undermined by the cuts to legal aid. In the criminal context, many submissions noted the increasing workload of duty counsel and more guilty pleas from people who have defences. As the Elizabeth Fry Society argued, this occurs in part because duty counsel are the only form of assistance available for an accused and their role is strictly limited to the entering of such pleas.

In general, submissions cited increasing delays, increasing frustration, and the sense that the quality of legal services is diminishing. A frequently repeated concern was that more people have less confidence in the justice system in which greater numbers of people have no place to turn for help. More people are unable to pursue their legal remedies because of the inability to find a lawyer, the insufficiency of the tariff, or the fact that there are whole areas of law for which people can no longer get certificates.

(g) Operations and Management

Suggestions to improve the management of the Plan included disbarring lawyers for defrauding it, faster turn around time for applications and billings, prioritizing areas of coverage and capping them, advising clients of the bills sent to legal aid for services provided on their behalf, and giving users and service providers input into operational decision-making.

The Older Women's Network submitted that legal aid needed to be designed for the poor and their legal needs, and to this end, it should offer one-stop services for education, advocacy, and law reform. Accessible buildings, interpretation services, and better trained staff around pressing social issues like domestic violence were also ways identified to improve service. Many submissions argued that the legal needs of low-income clients intersect with other needs and that legal aid needed to interact more effectively with other service providers and professionals in order to address more successfully the problems of its clients.

(h) Legal Aid As Part of the Larger Justice System

Many submissions identified the need for the justice system itself to be made more accessible. Also, alternative forms of dispute resolution needed to be explored. The underfunding of institutions like the Children's Lawyer, and the Ontario Human Rights Commission, and the reduction in test case litigation were said to have a negative impact on the costs of the justice system as a whole. Community groups also urged that the

recommendations of the Commission on Systemic Racism in the Justice System, and the Commission of Inquiry into Certain Events at The Prison for Women in Kingston, be adopted.

(i) Governance

Two issues dominated the submissions with respect to governance: Plan independence and community input. Many submissions indicated that the Law Society was in too much of a conflict role to administer legal aid effectively. One submission argued that though well-intentioned and professional in their management, people busy in their own practices lacked the time and expertise for the task.

5. ADMINISTRATORS OF THE ONTARIO LEGAL AID PLAN

Area Directors and administrators responded from across the province. They provided an overview of how the certificate component of the Plan is currently being administered and how the current system of priorities is being implemented. There was a strong tension in their submissions reflecting the scope of client needs and the current funding constraints.

(a) Client Needs

Several respondents argued that the lives of low-income people are quite different from those of traditional consumers of legal services and though different groups in society clearly have different needs, it would be wrong to overgeneralize in that all low-income people share many of the same legal needs. Needs that were identified included the need for basic legal information and summary advice, alternative dispute resolution, accessible facilities, interpretation services, and more generally, protection from powerful groups in society, including government. Areas of law included income maintenance, housing, administrative law, criminal law (especially where liberty is at issue), and family law (especially where custody or access is at issue).

(b) The Goals of the Legal Aid System

One submission strenuously argued that it was crucial to have a mandate which reflected funding levels and that such a mandate would provide a clearer picture of what services to provide and how to deliver them. There was general agreement that the goal should be to provide equal access to all areas of the justice system for persons unable to afford it on a consistent basis, throughout the province.

(c) Coverage

Priorities must be given to the most pressing needs, and criminal and family law areas were repeatedly identified as the most important areas of coverage. For many respondents, however, the current system is not meeting even the most urgent of needs in these two basic areas. In criminal matters, the possibility of incarceration was identified as a serious concern; in family law, the possibility of losing one's children, issues of domestic violence, child protection, or obtaining an adequate support order were identified as pressing issues. Some respondents proposed that an assessment of the seriousness of the matter for the applicant must be undertaken in order to determine coverage, while another respondent pointed out that many matters of great importance for low-income people can be solved with only a couple of hours work and that the system could be designed to accommodate this.

(d) Delivery Models

There was overwhelming support for a mixed delivery model of legal aid services that included clinics, duty counsel services, and judicare. Several respondents suggested that staff models, duty counsel or supervised paralegals could be utilized in the delivery of services such as summary advice, bail, or small hearings and trials. Choice of counsel was identified as being an important consideration for service delivery in serious matters. Clinics were viewed as an effective provider of general poverty law services and could be expanded to provide specialized delivery in the areas of Workers' Compensation, Canada Pension Plan, or Employment Insurance. In terms of choosing delivery models, factors such as efficiency, cost, and quality should provide the benchmarks for decision-making.

(e) Financing and Financial Eligibility

Generally, Plan administrators favoured restricting eligibility criteria to those in greatest need. Criteria should be set in conjunction with Ministry of Community and Social Service guidelines, cost of living indexes, and poverty-lines. Further, the same guidelines should be used notwithstanding the legal issue at stake. Repayment plans were thought to be difficult to administer and application fees were generally considered to be a good idea. In terms of funding, one respondent identified the importance of long term and secure funding from government, and another respondent argued that the federal government, or ministries like Community and Social Services, should fund litigation that falls within their policy objectives.

(f) The Impact of the Recent Constraints

As one respondent submitted, the cutbacks have meant that access to justice for many low-income people is being curtailed. Most Plan administrators pointed out that many more clients are proceeding unrepresented, sometimes in quite serious matters. They also pointed out that the cutbacks have directly contributed to the increasing workloads of duty counsel, increasing stresses on legal aid staff, court backlogs, and diminishing numbers of lawyers who will accept legal aid.

(g) Operations and Management

There were several submissions that argued that the various delivery models should be unified under one administration that could monitor such matters as statistics, quality assurance, and funding. At the very least, the clinic and certificate sides required better coordination. Generally, submissions supported a continuation of area administration with more pro-active management to promote consistent and uniform applications of policy and service across the province. Some submissions suggested improved computer systems, increased training for Area Directors, the use of efficiency experts, and more ongoing contact between members of the legal profession and Plan administration.

(h) Legal Aid as Part of the Larger Justice System

The complexity of the legal system was viewed as a problem in terms of legal aid service and access to justice more generally. In the area of criminal law, respondents submitted that Crown initiatives like disclosure, diversion, charge screening, pre-trials, and electronic remands should continue to be used or implemented. Section 11 of the *Young Offenders Act* was considered unfair and inappropriate, and the *Charter* has added costs to the provision of legal aid. In the area of family law, respondents suggested capping the number of family court appearances and instituting duty counsel for the General Division. Cutbacks to the Bail

Program, the Children's Lawyer, and the Family Support Plan, for example, have had deleterious effects on legal aid's ability to meet increasing demands, as have police charging policies, increases in the number of new offenses, government initiatives like zero tolerance policies in schools, the reduction in the funding of test cases, and increases in court filing fees.

(i) Governance

Whether the Law Society maintains governance or whether an independent agency is instituted, most submissions favoured more input from all stakeholders with respect to the administration of legal aid. One respondent noted that one advantage to Law Society governance is that it has been a strong and positive force with respect to negotiating with government. On the other hand, it was suggested that the public sees a conflict of interest with respect to the current governance structure. According to most respondents, independence from government needs to be an important feature of any governance structure.

APPENDIX B

LIST OF PERSONS AND ORGANIZATIONS WHO SUBMITTED WRITTEN BRIEFS

(a) COMMUNITY ORGANIZATIONS/INDIVIDUALS

Action Ontarienne Contre la Violence Faite Aux Femmes
Algoma Manitoulin & District Labour Council
Anishabek Nation
Assaulted Women's Helpline
Canadian Mental Health Association
Committee for Spousal and Children's Pension Survival and Related Benefits
Elizabeth Fry Society of Simcoe County
Family Service Association of Metropolitan Toronto
Federation of Metro Tenants Associations
Grand Council Treaty #3
Hiatus House
Houselink Community Homes
Injured Workers' Advocates of the North Shore and District
John Howard Society of Ontario
Kent County Social Justice Coalition
Lakehead Social Planning Council
Life*Spin
London Bridge Child Care Services Inc.
London Coordinating Committee to End Woman Abuse
London Urban Alliance on Race Relations
Multiple Sclerosis Society of Canada
National Action Committee on the Status of Women
National Council of Welfare
Ne-Chee Friendship Centre
Niagara South Social Safety Network
Nigerian Canadian Association
Nipissing First Nation
Ontario Association of Children's Aid Societies
Ontario Association of Interval and Transition Houses
Ontario Coalition of Senior Citizens' Organizations
Ontario Federation for Cerebral Palsy
Ontario Federation of Indian Friendship Centres
Ontario Network of Injured Workers Groups
Ontario Public Service Employees Union, Local 525
People in Transition Inc.
Persons United for Self-Help in Northwestern Ontario Inc.
Older Women's Network, Metro Toronto and Area Council
Rosewood Shelter for Abused Women and their Children

Social Planning Council – Sudbury Region
St. Leonard's Society of Canada
Thunder Bay Indian Friendship Centre
Thunder Bay & District Injured Workers Support Group
Toronto Refugee Affairs Council

Beleskey, Brent
Dulude, Louise
Jenkinson, Michael
Lancaster, Oleana
Martin, C.
McLeod, Lyn
Osborn, W.D.
Paton, R.
Sunisloe, A.
Vidal-Ribas, M. Victoria
Whelton, Maureen
Windsor, Charles
Wood, Bob
Yeager, Matthew G.

(b) JUDICIARY/ADMINISTRATIVE AGENCIES

Alternative Dispute Resolution Centre
Board of Inquiry
Legal Services Branch, Ministry of Community and Social Services
Ontario Board of Parole
Ontario Human Rights Commission
Ontario Judges Association and Family Law Judges Association
Pay Equity Commission
Pay Equity Hearings Tribunal
Workers' Compensation Appeals Tribunal

(c) COMMUNITY LEGAL CLINICS/CLINIC ORGANIZATIONS/STUDENT LEGAL AID SOCIETIES

Aboriginal Legal Services of Toronto
Advocacy Centre for the Elderly
Advocacy Resource Centre for the Handicapped
African Canadian Legal Clinic
Canadian Environmental Law Association
Clinique Juridique Grand-Nord Legal Clinic
Community Legal Education Ontario
Community Legal Services (Ottawa-Carleton)
Downsview Community Legal Services
East Toronto Community Legal Services

Flemington Community Legal Services
 Hastings and Prince Edward Legal Services
 HIV & AIDS Legal Clinic
 Industrial Accident Victims Group of Ontario
 Injured Workers' Consultants
 Justice for Children and Youth
 Kinna-aweya Legal Clinic
 Landlord's Self-Help Centre
 Legal Assistance Kent
 Metro Toronto Chinese and Southeast Asian Legal Clinic
 Neighbourhood Legal Services
 Nipissing Community Legal Clinic
 Northumberland Community Legal Centre
 Parkdale Community Legal Services
 Peterborough Community Legal Centre
 Renfrew County Legal Clinic
 Rural Legal Services
 Simcoe Legal Services Clinic
 South Etobicoke Community Legal Services
 South Ottawa Community Legal Services
 Stormont Dundas & Glengarry Legal Clinic
 Toronto Workers' Health and Safety Legal Clinic
 Waterloo Region Community Legal Services
 Windsor Essex Bilingual Legal Clinic
 York Community Legal Services

Association of Community Legal Clinics Ontario
 Clinic Funding Committee
 Interclinic Immigration Working Group
 Provincial Clinic Association Steering Committee

Community & Legal Aid Services Programme (York University)
 Community Legal Services (University of Western Ontario)
 Downtown Legal Services (University of Toronto)
 Legal Assistance of Windsor (University of Windsor)
 Students' Legal Aid Society (Queen's University)
 Correctional Law Project (Queen's University)

(d) LEGAL ORGANIZATIONS/PRACTITIONERS

Association des Juristes d'Expression Francaise de l'Ontario
 Canadian Association of Black Lawyers
 Canadian Bar Association-Ontario
 Carleton Law Association
 Criminal Lawyers' Association
 Criminal Lawyers' Association (London)

Criminal Lawyers' Association (Windsor)
Defence Counsel Association of Ottawa
District of Kenora Law Association
Essex Law Association
Essex County Family Law Association
Family and Civil Bar of Northumberland
Family Lawyers' Association
Law Society of Upper Canada
Refugee Lawyer's Society Association of Ontario
Paralegal Society of Ontario
Southwest Region Women's Law Association
Women's Law Association

Anderson, Peter D.
Arajs, Vera M.
Baig, B. Lee
Beach, Peter M.
Benson, Gordon
Cameron, Ian
Cox, Harold J.
DeRusha, Haig
Durno, Bruce
Gaster, Cheryl
Ellies, M. Gregory
Grenkie, J.D.
Gunsolus, Drew S.
Hill, R.G.F.
Jacquard, Trevor A.
Kelly, Rhonda
Kieffer, John H.
Labine, Gilbert
Martin, Cynthia
Kenkel, Joseph F.
Kirby, Peter
McClelland, Glenna G.
McComb, David
McDowell, Roderick H.
Munro, Nicola
Osborn, W.D.
Paton, Ramona T.
Potts, James R.L.
Predko, Anne Marie
Sinclair, Brian
Smart, Russel
Starkman, Alvin G.
Stockton, Robert W.
Stomp, Tamara

Thompson, Terry W.
Van Buskirk, Richard M.
Walker, Arnold B.
Weppler, James E.
Wexler, Beverly
Whelton, Maureen
Ziriada, David

(e) **OLAP AREA DIRECTORS AND STAFF**

Birbaum, Sandra
Buchanan, Robert
Byfield, Lesley
Davies, Simon R.R.
Harry, Alexander C.
Layne-Parkin, Vivian
Nantais, Cheryl
Stevens, Mary-Anne
Stuart, Peter B.
Wilson, John
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Zado, A. John

APPENDIX C

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Jack Gemmell
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Caroline McChesney
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David Baker
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Susan Eagle
Norm Feltes
Ian Morrison
Katyryn Pereira

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